

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

OHIO COAL ASSOCIATION, et al.,

v.

Case No. 2:14-cv-2646

THOMAS E. PEREZ, et al.,

Defendants.

and

**MURRAY ENERGY CORPORATION, Case No. 2:15-cv-448
et al.,**

Judge Graham

Plaintiffs,

Magistrate Judge Deavers

v.

THOMAS E. PEREZ, et al.,

Defendants.

ADMINISTRATIVE RECORD

PAGES 01292-01515

Statement of Thunder Basin Coal Co MSHA's Proposed Rule – 30CFR Part 104 Pattern Of Violation (POV)

Introduction - Members of the panel, my name is Tim McCreary. I am the Safety Manager at the Thunder Basin Coal Company in Wright WY. I want to thank you for the opportunity to address the panel concerning Thunder Basin's views on the proposed rule regarding Pattern of Violation or POV.

I'm fortunate to be working at Thunder Basin Coal. That's because Safety is a core value at Thunder Basin. We have a strong commitment to safety starting with the CEO of the company. Thunder Basin implemented a Behavior Based Safety Process about 4 years ago. We've seen over the past 30 years or so that more Rules and Regulations will only get you so far in terms of safety. The Rule is only as good as the behavior that drives compliance. For these reasons I don't believe Thunder Basin will be affected by this section of the Mine Act.

Having said that, we at Thunder Basin can't sit by when there are fundamental problems with this proposed rule that affect the very foundation of our society.

Proposed - Section 104.2 Pattern Criteria

This section states it would "specify the general criteria" that MSHA would use to identify mines with a pattern of violations. MSHA has asked for comments on how the agency should obtain comment during the development of and periodic revision to, the POV screening criteria.

Obviously this tells us the Agency expects the POV regulation to be a moving target. Since the latest "retooling" of the criteria, it's difficult to believe that the agency doesn't already have a desired criteria formula in mind. The current rule has specific benchmarks in each category. If the agency intends to adjust those numbers and formulas, there should be a public comment period prior to this being put into action.

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Transparency has been touted as a cornerstone of this administration. This proposed rule is anything but transparent.

MSHA must normalize the formulas for each category. By using whole numbers cut offs to determine the weigh points, the size of the operations is overlooked. There must be a formula to normalize the equation to keep every size of operation on a level playing field.

As far as pattern of violation of the same standard is concerned; our largest citation category is 77.404(a) which is a catchall standard for mobile and stationary equipment. When no other standard fits, violations are written under 404(a). At a large operation with more than 400 pieces of mobile equipment, a quick glance by the standard number might indicate a pattern of repeat violations. But if you dig in a little deeper and read the description of the violation, they are nearly all written for totally different conditions. Does this truly reflect a pattern of violation? I don't think so!

MSHA needs to spell out specific criteria and allow for a public comment period on that criteria before a final rule is developed.

The proposed rule would eliminate the existing requirement in 104.3(b) that only citations and orders that have become final orders are to be used in the POV calculation. The agency states that due to the large number of contested citations and the time to process them, that only using final orders hinders MSHA's ability to enforce the Mine Act.

Let's be perfectly frank here, the agency intends to eliminate due process if this rule becomes final.

When George Mason forged out the Bill of Rights, he intentionally put in place what we know as the 5th amendment to the constitution. This amendment prevents individuals from being deprived of life, liberty or property without due process.

Due process extends to all persons and corporate entities to protect against abuse of government authority. Our system of justice has always worked on the premise that a person is innocent until proven guilty! I think the past 235 year history of our country proves that it's been an extremely important part of our constitutional rights. By allowing an

MSHA inspector to issue a citation or order without the possibility of due process as to validity of the citation or order, will allow the inspector to become the judge, jury and executioner for an operation that is nearing POV status! Inspectors are not right every time!

MSHA also needs to consider the reasons for the large number of citations under contest. I believe in large part that it's due to "regulatory creep". That is when inspectors in the field continue to stretch the reach of the regulation. The industry has done a good job over the years at eliminating violations and the inspectors seem to feel a need or pressure to write more citations. Therefore we find a stretch of the meaning of the regulation to find something to write.

Understanding that the Secretary has been given broad discretion to develop these rules, no one should ever believe that the congress had any intent to eliminate our constitutional rights in the process. Due process is a basic right of a democratic society.

MSHA must reinstate the provision that only final orders be used in determination of a Pattern of Violation.

Proposed - Section 104.3

The agency states in the proposed rule that all references to a PPOV or Potential Pattern Of Violation would be deleted. Recent months have shown this to be a very valuable tool for MSHA to have in their toolbox.

As MSHA stated in an April 12, 2011 press release, major reforms to the POV process have been implemented, "including a new screening criteria and a new review process that improves the agency's ability to identify problem mines".

Between November and December last year, the agency put 14 mines on a potential pattern of violation. 10 of those operations have made enormous improvements in their S&S rates. One operation had an 87% reduction. The least improved in this group showed an improvement of 39%. This is a tremendous success story! With these types of results, why wouldn't MSHA want to keep this tool?

Is MSHA's mission to improve safety in our nation's mines or is to close down mining operations? A large underground mine might well be handed a "death sentence" if not allowed the notice of the potential to be placed on POV. MSHA has proven that notifying mining operations of their "potential" is extremely effective. The agency must keep the Potential Pattern Of Violation notice in the toolbox.

Although the current rule has some misgivings, it has recently proven its effectiveness.

Summary –

We appreciate the opportunity to share our views on this important topic. The POV tool could be crafted to be extremely effective in dealing with chronic and persistent violators of safety and health laws.

To be effective, the Final Rule needs to be transparent by involving all stakeholders on the "specific criteria". It must afford mine operators due process and "fair notice" with opportunity to make meaningful improvements.

Thanks for your time and consideration in this matter.

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
PATTERN OF VIOLATIONS)

Pages: 1 through 61
Place: Charleston, West Virginia
Date: June 7, 2011

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AB73-PH-2

IN THE MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
PATTERN OF VIOLATIONS)

Charleston, West Virginia

Tuesday
June 7, 2011

APPEARANCES

MSHA Panel: PATRICIA W. SILVEY, JAY MATTOS,
CHERIE HUTCHISON, ANTHONY JONES

Speakers:

CHRIS HAMILTON, West Virginia Coal Association
JOHN GALICK, Alpha Natural Resources
BRIAN LACY, United Mine Workers of America
KENNY MURRAY, Alliance Coal

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1

P R O C E E D I N G S

2

(11:31 a.m.)

3

MODERATOR SILVEY: Again, good morning. My name is Patricia W. Silvey, and I'm Deputy Assistant Secretary of Operations for the Mine Safety and Health Administration. I will be the moderator of this public hearing on MSHA's proposed rule for pattern violations. On behalf of Assistant Secretary Joseph A. Main, I would like to welcome all of you here today.

10 At this point, I would like to introduce the members of the MSHA panel. The Chair of the Pattern Rulemaking Committee to my left is Jay Mattos; to my right, Cherie Hutchison, who is with the Office of Standards; and to her right, Anthony Jones, who is with the Department of Labor Office of the Solicitor.

16 In response to requests from the public, MSHA is holding public hearings on the pattern of violations proposed rule. This is the second of four public hearings. As all of you know, the hearings are being held in tandem with the proposed rule on Examinations of Work Areas.

22 The first hearing was held in Denver on June 23nd; the third hearing will be in Birmingham, Alabama, on June 9th; and the final hearing in Arlington, Virginia, 25 at the headquarters' office on June 15th.

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1 The Pattern of Violations proposal applies to
2 all mines, coal and metal/nonmetal, surface and
3 underground.

4 The purpose of the hearing is to receive
5 information from the public that will help MSHA evaluate
6 the requirements in the proposal and produce a final rule
7 that will improve health and safety conditions at mines.

8 As most of you know, the hearings will be
9 conducted in an informal manner. Formal Rules of
10 Evidence will not apply. The hearing panel may ask
11 questions of the speakers and the speakers, as I said at
12 the prior hearing, may ask questions of the hearing
13 panel.

14 Speakers and other attendees may present
15 information to the court reporter for inclusion in the
16 rulemaking record. MSHA will accept written comments and
17 other appropriate information from any interested party
18 including those not presenting oral statements.

19 I assume that by now everybody has signed the
20 attendance sheets. If you have a hard copy or electronic
21 version of your presentation, please provide the court
22 reporter with a copy.

23 The post-hearing comment period for the
24 proposed rule ends on June 30th. MSHA must receive your
25 comments by midnight, Eastern Daylight Savings Time, on

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1 that date.

2 MSHA is proposing to revise the Agency's
3 existing regulations for pattern of violations. MSHA
4 determined that the existing pattern of violations
5 regulation does not adequately achieve the intent of the
6 Federal Mine Safety and Health Act of 1977, or the Mine
7 Act. Congress included the Pattern of Violations
8 provision in the Mine Act so that operators would manage
9 safety and health conditions at mines and find and fix
10 the root causes of Significant and Substantial, or S&S,
11 violations to protect the safety and health of miners.
12 Congress intended that MSHA use the Pattern of Violations
13 provision to address operators who have demonstrated a
14 disregard for the safety and health of miners.

15 MSHA intended that the proposal would simplify
16 the existing Pattern of Violations criteria and improve
17 consistency in applying the Pattern of Violations
18 criteria and more adequately achieve the statutory
19 intent. The proposal would also encourage chronic
20 violators to comply with the Mine Act and MSHA's safety
21 and health standards.

22 MSHA requested comments from the mining
23 community on all aspects of the proposed rule. It's
24 particularly interested in comments that address
25 alternatives to key provisions in the proposal. The

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1 preamble discusses the provisions in the proposal and
2 includes a number of specific requests for comment.

3 The proposed rule would include general
4 criteria and would provide that the specific criteria
5 used in the review to identify mines with a pattern of
6 S&S violations would be posted on MSHA's website.

7 In the preamble to the proposal, MSHA requested
8 suggestions on how the Agency should obtain comments from
9 mine operators and mines during the development of, and
10 the periodic revision to, the specific POV criteria.

11 MSHA also requested comments on the best
12 methods for notifying mine operators and the mining
13 public of changes to these criteria. In the Public
14 Hearing Notice, MSHA clarified its plans and stated that
15 it would provide any change to the specific criteria to
16 the public for comment via posting on the Agency's
17 website before MSHA uses it to review a mine for a
18 Pattern of Violations.

19 MSHA plans to review and respond to the
20 comments, revise as appropriate the specific criteria,
21 and post our response and any revised specific criteria
22 on the Agency's website.

23 And so to explain that, right now, you all know
24 that the specific criteria for patterns are posted on the
25 Agency's website. And what we said in the Public Hearing

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1 Notice was that before we make any changes to the
2 specific criteria, we would make that available to the
3 public on our website. We would allow the public to
4 comment. We would respond to the public's comments; and
5 then if we had to revise that specific criteria based on
6 comments made by the public, we would post the revised
7 criteria, as well as our response to the public comments
8 on our website.

9 So we ask for your comments on this proposed
10 approach to obtaining public input into revisions to the
11 specific criteria. MSHA also requested comments on the
12 burden that monitoring a mine's compliance record against
13 the proposed POV specific criteria using the Agency's
14 website would place on mine operators.

15 As most of you probably know, we developed a
16 web tool to make it easier -- I know some of you know
17 because I know some of you came into Arlington and we
18 presented the web tool to you, but we developed -- in the
19 interest of transparency, we developed a web tool to make
20 it easier for mine operators to monitor their compliance.
21 We asked that commenters give us their reactions to the
22 web tool and if they would, include any detailed
23 rationale and supporting documentation for any comments
24 or suggested alternatives.

25 Under the proposed rule, to be considered a

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1 mitigating circumstance, the proposed rule would provide
2 that an operator submit a written safety and health
3 management program to the District Manager for approval.
4 In other words, if an operator used the web tool or some
5 other format and found that they were approaching the
6 parameters in the specific criteria, they could come in
7 to MSHA and submit a safety and health management program
8 as a mitigating circumstance to the District Manager.

9 MSHA would review the program to determine
10 whether the program's parameters would result in
11 meaningful, measurable, and significant reductions in S&S
12 violations. MSHA would like to clarify -- because we've
13 gotten some comments on this and we got some comments at
14 the public hearing in Denver that the Agency did not
15 intend that safety and health management programs that
16 are referred to in this proposed rule be the same as
17 those referenced in the Agency's rulemaking on
18 comprehensive safety and health management programs.

19 Those are two different -- two different items
20 and that other rulemaking, MSHA had not -- the safety and
21 health management system rulemaking, MSHA had not gotten
22 to the proposed rule stage on that rulemaking. MSHA
23 would consider a safety and health management program as
24 a mitigating circumstance in the Pattern of Violations
25 proposal when it includes measurable benchmarks for

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1 abating specific violations that could lead to a Pattern
2 of Violations at a specific mine and addresses hazardous
3 conditions at that mine.

4 MSHA requested detailed information and data on
5 costs, benefits, and feasibility of implementing these
6 proposed provisions. MSHA requested specific comments on
7 its estimates on numbers of mines affected, which are
8 likely to vary from year to year.

9 As you address the proposed provisions, either
10 in your testimony today or your written comments, be as
11 specific as possible about how the changes would affect
12 the health and safety of miners, and also be as specific
13 as possible in any suggested alternatives, including your
14 rationale. MSHA will make available transcripts of all
15 the public hearings approximately two weeks after the
16 hearing. You may view the transcript on our website at
17 www.MSHA.gov or www.regulations.gov.

18 And we will now begin our testimony. Please
19 begin by clearly stating your name and organization and
20 spelling your name, so that the court reporter will have
21 an accurate record.

22 Our first speaker is Mr. Bissett with the
23 Kentucky Coal Association. Is he here?

24 We would now then move to Mr. Hamilton, Chris,
25 West Virginia Coal Association.

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1 MR. HAMILTON: For the record, my name is Chris
2 Hamilton.

3 And allow me to simply reference my
4 introduction earlier here today to incorporate as a
5 preface for my specific comments on this ruling if that's
6 all right.

7 MODERATOR SILVEY: Can we go off the record?
8 (Off the record.)

9 (On the record.)

10 MR. HAMILTON: As it relates to the West
11 Virginia Coal Association, who we represent and some of
12 the concerns we have as we continue to lose production
13 here in Central App.

14 And let me say, we at the outset recognize the
15 importance of the Agency's Pattern of Violations power to
16 effectively carry out what I think we would all envision
17 as the intent of the Mines Act, and that's to have the
18 ability to sanction some additional sanctions against
19 those operators that we feel are recalcitrant or
20 otherwise simply just not complying, not complying with
21 the law.

22 However, we do believe strongly that the POV
23 system should be (1) simplified; (2) transparent; (3)
24 fundamentally fair; and (4) uniformly applied before
25 changes to the current process are made; therefore, we

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1 oppose MSHA's proposed changes to the existing POV
2 procedure for the following specific reasons.

3 First, MSHA's proposed rule in our view clearly
4 violates mine operators' due process rights and
5 principles of fundamental fairness. The current POV
6 procedure requires that only citations and orders that
7 have become final will be used to identify mines with
8 potential POV issues. MSHA's proposal would change this
9 approach and allow POV determinations to be made solely
10 off of violations that have been issued as opposed to
11 those that are final adjudication.

12 While we fundamentally agree in the purpose of
13 the POV power, we believe the extension of the rule would
14 leave an operator presumed guilty rather than innocent
15 until proven guilty and is, accordingly, unfair. MSHA
16 believes that this change is absolutely necessary to cure
17 a large backlog of cases pending before the Federal Mine
18 Safety and Health Review Commission. This, coupled with
19 MSHA's belief that only a small fraction of Significant
20 and Substantial violations are ever modified or vacated,
21 is the main reason for MSHA's evisceration of due
22 process.

23 Most troubling is the fact that MSHA itself has
24 contributed to the backlog of cases more than any other
25 single factor because of the substantial increase in

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1 questionable citations issued by inspectors.

2 This proposed rule is nothing more than an
3 irresponsible attempt by MSHA to clean up some of its own
4 inconsistencies while leaving operators no chance at
5 being heard. Given this lack of justification, the
6 current POV rule should not be altered. MSHA should not
7 have the authority to end run such a constitutional right
8 of due process, no matter how busy they are or for any
9 other reason.

10 The Fifth Amendment's guarantee of due process,
11 at the heart of due process is an individual's right to
12 his or her property. The Fifth Amendment of the U.S.
13 Constitution holds that no person shall be deprived of
14 life, liberty, property, or due process of law. It
15 should not be punitive POV sanctions for violations
16 issued instead of final adjudications on contested
17 citations or orders and it is an absolute denial of this
18 right.

19 To constitute a due process violation, a party
20 must be deprived of a protected interest; and, if so, the
21 Court must determine what process is due. Surely, the
22 shutting down of a mine operation and the economic
23 detriment that would attach would qualify for due process
24 and envisioned by the Fifth Amendment.

25 Congress was well aware of such dangers when

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1 they passed the Mine Act and created a way for mine
2 operators to be heard. All of this protection was
3 designed to prevent erroneous deprivation and though
4 slow, the current system prevents this deprivation. In
5 fact, MSHA stated during the formal rulemaking process
6 for the current POV rule that in order to avoid
7 inequities regarding which mines are placed on a pattern,
8 the Agency must make ample provision for due process when
9 applying the broad framework.

10 MSHA will consider only final citations and
11 orders when identifying mines with a potential of
12 violations. MSHA has completely changed its position
13 apparently in favor of inequities in the POV process.

14 Secondly, the POV rule must ensure that mine
15 operators receive adequate notice and a fair opportunity
16 to be heard. With the current proposal, it appears that
17 MSHA would also have the current practice of full and
18 fair notice to operators. Fundamental fairness requires
19 that operators be made aware of circumstances giving rise
20 to the issuance of a POV, thereby, giving the operator a
21 reasonable opportunity to address any condition that
22 might alleviate the situation altogether.

23 Even Secretary Main once commented on the
24 necessity of fair and adequate notice. He once stated in
25 a letter to MSHA regarding the proposed version of the

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1 current POV rule that: "All mines, which are under
2 review for potential Pattern of Violations shall be given
3 notice to that effect by the Agency. This notice is
4 designed to give operators the opportunity to take
5 concrete actions and improve the citation history at the
6 mine and to implement a remedial plan. MSHA should
7 evaluate these and similar company efforts to correct the
8 Pattern of Violations when the Pattern Notice Conference
9 is held."

10 It is well established that courts and
11 prosecutors are not allowed to suspend the rights of its
12 litigants just because they may be overworked. Likewise,
13 MSHA should not be allowed to do so. There has been
14 absolutely nothing to warrant the proposed changes to
15 this rule. It is nothing more than an attempt by MSHA to
16 enact administrative conveniences at the expense of mine
17 operator rights.

18 At a minimum, MSHA should provide a pre-
19 dispositional hearing to operators. MSHA and the
20 commission should adopt a formal system that would
21 consolidate and expedite violations being contested in a
22 way that affords operators reasonable opportunity to
23 contest erroneous penalties.

24 Third, the potential for unchecked malfeasance
25 on the part of MSHA inspectors allowing MSHA inspectors

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1 to write S&S violations that can be added to a POV
2 without a hearing is simply unfair in numerous other ways
3 as well. For example, it may not have been considered by
4 many, but under this proposed rule if an MSHA inspector
5 truly wishes to place a mine operator on a POV, they can
6 accomplish this in just a matter of months. Assuming
7 that there was just one inspector with a personal
8 vendetta against the mine, they could single-handedly
9 bankrupt a mine operator under the proposed rule as MSHA
10 has largely abandoned the conference system. This
11 proposed system leaves no avenue to challenge those
12 citations and orders.

13 There being no safeguards with this type of
14 activity and to allow this loophole to exist is the
15 height of irresponsibility. In fact, the only kind of a
16 safeguard available for this scenario is not much of a
17 safeguard at all. MSHA may argue that a check on an
18 inspector with a personal vendetta against the mine is
19 the gravity of the harm requirement for writing an S&S
20 violation, which must be at the least reasonable
21 likelihood; however, should an inspector improperly place
22 the gravity of the harm as reasonably likely, there would
23 be no recourse for the operator before being placed on
24 the POV under the proposed rule because an operator would
25 not have been afforded a hearing on the improper gravity

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1 mark before the violation is added to the POV.

2 The above concern is exasperated due to the
3 current adversarial relationship that exists today
4 amongst industry and MSHA inspectors and the inexperience
5 level of a number of MSHA new hires today.

6 And we heard from a representative from the
7 State of Illinois earlier, and I've heard the same from
8 representatives of our State Department of Mines here in
9 West Virginia, that many of the new hires joining the
10 ranks of the inspectors at MSHA do not meet the
11 qualifications to be hired as a state inspector. And we
12 understand that many of the new hires at the Agency have
13 not even met the qualification and competence
14 requirements set forth in MSHA policy.

15 And, thirdly, it's been well documented that
16 there's a lack of training that a number of new hires
17 have received in preparation for their new
18 responsibilities and important work.

19 Another issue that I would simply raise is that
20 one of the screening criteria for POV determinations
21 involves a calculation using the inspector's on-shift
22 hours; therefore, shouldn't MSHA be using the on-shift
23 hours of all authorized representatives that frequent or
24 visit a mine site, including supervisors, assistant
25 District Managers, technical specialists, and even

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1 District Managers since they carry authorized
2 representative cards.

3 Section 104 of the Mine Act requires all
4 authorized representatives to issue citations and orders
5 when they believe a violation exists. So, again, we
6 would simply point out that we believe that all the time
7 for all authorized representatives ought to be used --
8 ought to be part of the calculation for POV purposes.

9 In conclusion, we would agree that the POV can
10 be a useful tool to ensure compliance with the Mine Act,
11 however, the proposed rule on the table now is simply too
12 far-reaching to be approved. It is our position that
13 this is being posed as an administrative convenience for
14 dealing with a self-imposed problem and aims to destroy
15 basic civil liberties.

16 For the reasons stated here already, we would
17 respectfully oppose the implementation of this rule.

18 Now, in lieu of doing nothing, we would ask
19 MSHA to exercise its authority to establish an advisory
20 group of mine safety experts to determine -- to look at
21 this whole issue and others that surround it to determine
22 whether fundamental changes to the program are necessary,
23 and if so, how to make this a genuine workable tool for
24 the Agency and for the industry alike.

25 And I would remind the panel that last year,

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1 there were a number of changes that were advanced before
2 Congress to make this program more workable, including a
3 rehab -- what was characterized as a rehab period for
4 operators who undergo a variety of safety initiatives to
5 improve their overall mine safety performance.

6 And there was also a means to more accurately
7 assess a mine's safety performance record known as the
8 Safety Performance Index that was also known as the
9 Grayson model, so that a mine's safety index and
10 performance in totality was factored into any program
11 that had with it the most severe enforcement sanctions.
12 It was a model developed by a professor, Dr. Larry
13 Grayson at Penn State University. It was introduced
14 during several congressional hearings held on several
15 pieces of legislation moving from Congress a year ago,
16 and I think it was attested to by law that it would be a
17 more accurate instrument or barometer of measuring mine
18 safety performance.

19 So we would simply alternatively suggest that
20 you develop those safety enforcement principles and
21 enforcement and administrative tools through a
22 participatory process with all stakeholders within the
23 industry.

24 So that concludes my testimony. I'm available
25 to answer any questions that the panel would have.

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1 MODERATOR SILVEY: Thank you, Chris.

2 First of all, short of an advisory, you
3 recommended that the Agency withdraw the proposal and you
4 said that you would recommend that we form an advisory
5 committee.

6 I'm going to ask you the same sort of question
7 that I asked in the prior hearing. Short of an advisory
8 group, would you have an alternative proposal that you
9 would make to the Agency for Pattern of Violations?

10 MR. HAMILTON: Yes. I would adhere to the
11 current final adjudicated violations as the basis -- or
12 citations as the basis for POV determinations and would
13 provide for a more detailed delineation of procedural
14 steps for operators to have an opportunity to discuss and
15 conference that record, as well as have an opportunity to
16 improve the specific conditions cited by MSHA when making
17 a POV determination.

18 MODERATOR SILVEY: Can you put those in writing
19 and send them into us?

20 MR. HAMILTON: Yes, I will do, yes.

21 And is the final comment the same as for the
22 preceding hearing?

23 MODERATOR SILVEY: Yes, yes.

24 On your reference to the proposed legislation
25 last year, and I think probably some of you in the room

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1 are familiar with that and you mentioned that safety
2 performance index.

3 Let me ask you something. That model that was
4 in that proposed legislation, have you taken that model
5 and actually applied it to any real mines in the members
6 of the West Virginia Coal Association and, therefore,
7 data, have you taken that mine, and then taken one of the
8 mines in your group and applied that model to see how the
9 mines, how they come out?

10 MR. HAMILTON: Yes.

11 MODERATOR SILVEY: You have done that?

12 MR. HAMILTON: Yes.

13 MODERATOR SILVEY: And what happened?

14 MR. HAMILTON: Based on the experience level
15 and competence of those that were involved in that
16 process, there was a general conclusion that it was a
17 more useful tool in accurately measuring a mine safety
18 performance, what mine health and safety professionals
19 would reasonably conclude as a more accurate instrument
20 or barometer for measuring mine health and safety.

21 Now, I don't have the data for the results to
22 give you, mathematically, but the general conclusion,
23 almost without exception, was that it was a far better
24 method of measuring mine safety in totality, real mine
25 safety versus, again, the mere issuance of a category of

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1 MSHA citations.

2 MODERATOR SILVEY: And I don't need to go to
3 the effort to recite to you the preamble. I did some of
4 it in my opening statement, and I know you don't want to
5 hear it again, but a couple of things --

6 MR. HAMILTON: I will incorporate that in my
7 written comments.

8 MODERATOR SILVEY: What?

9 MR. HAMILTON: That was my humor.

10 MODERATOR SILVEY: Okay.

11 MR. HAMILTON: And I apologize for that.

12 MODERATOR SILVEY: That's all right. No.
13 The -- a couple things, though, are worth
14 noting. And the first being, you know -- and you all
15 probably know -- some of you know that we've got comments
16 on the issue that we propose to eliminate the final order
17 and we gave our rationale for doing that in the preamble.

18 You know, one of the things, though -- because
19 now you mention the proposed mine safety legislation, one
20 of the things that when Congress drafts the legislation
21 and that, you know, whether it passes or not, a lot of
22 times you will find what Congress said about that
23 legislation in the legislative intent and there's a
24 number of things in the legislative history to the 1977
25 Mine Act that goes to Congress's intent, and we

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1 referenced that in the preamble to the proposed rule,
2 particularly when it comes to the concept of final
3 orders.

4 And as many of you -- some of you know that
5 that provision was put in. Congress at the time thought
6 that they did not have the tool to appropriately deal
7 with what happened at the Scotia mine and the fact that
8 ventilation violations, violations, not final orders were
9 left to occur over and over and over again and that at
10 the time, MESA didn't seem to have the tool to deal with
11 these violations.

12 So I say that only as a point of reference.
13 The second thing is you mentioned in your testimony that
14 of all these questionable citations issued by the MSHA
15 inspectors -- and I will say that one of the things that
16 MSHA strives to do, it might not look like it to you all,
17 is to improve the consistency of enforcement, although
18 all of us here probably would admit to this and
19 particularly people who have been inspectors either
20 inspectors or for that matter examiners would note that
21 and you said some of that meant that whenever you have
22 the human element and have a particular standard, that
23 may be nine times out of ten, nine inspectors might see
24 it the same way; but that one time, there might be a
25 difference of interpretation in how an inspector might

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1 see it, and that is why we try to minimize any
2 inconsistency, that might tend to be some inconsistency.

3 But on that note, just for everybody to know
4 that, we have -- we do issue a fair number of violations
5 and we've got statistics on that and the majority of the
6 violations are paid without contest. Then a even smaller
7 percentage are -- sometimes they are modified, but the
8 percentage is quite small of the citations that are
9 modified, let's say from -- because that would be
10 significant in this case, no pun intended, but they are
11 modified from S&S, Significant and Substantial, to non-
12 S&S. There's a pattern of S&S violations, but then an
13 even smaller percentage are vacated.

14 And when I say "smaller," I think less than 2
15 percent are vacated. So overall when you look at it -- I
16 mean, we get all these comments to us about all of these
17 changes are going to be made. And when you look at it,
18 the data will show that the vast majority are really
19 upheld if they are contested, upheld on appeal, but even
20 the greater majority are not contested at all.

21 Having said all that, if you would -- when you
22 were mentioning that legislation, that legislation had a
23 rehab period -- and I can't remember that proposed
24 legislation in detail -- but one of the things MSHA has
25 tried to do in this proposed rule is to -- and I

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1 mentioned that in my opening statement, but it's the
2 concept you talk about of rehab, that if a mine thought
3 the mine were approaching a Pattern of Violations, they
4 could come in with the safety and health management
5 program and that safety and health management program
6 would be aimed at the type of S&S violation that the
7 operator was approaching that looked like might be giving
8 rise to the pattern, and that's where MSHA -- and MSHA
9 has some experience under sort of that concept right now,
10 mines are coming in with -- I guess do we call them
11 safety and health plan --

12 MR. MATTOS: Corrective action.

13 MODERATOR SILVEY: Yeah. Mines are coming in
14 with corrective action plans; and on the majority of the
15 corrective action plans, they've achieved just what you
16 talked -- the concept of rehab. I mean, they've
17 significantly improved their S&S violations and the other
18 indices in the formula that we use to consider a mine for
19 pattern, which is really what we look to. I mean, that's
20 really the purpose of the whole Pattern of Violations
21 provision is so that the mine is made safe, and I think
22 we are seeing some improvements in that concept.

23 MR. HAMILTON: A couple comments. I'm not sure
24 it's really appropriate here today to compare the early
25 '70s and Scotia and some of the findings of that to what

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1 we're dealing with today.

2 MODERATOR SILVEY: Well, I mean, I was just
3 going back to -- I mean, I was just going back to point
4 to something of a Pattern of Violations provision.

5 MR. HAMILTON: I know.

6 MODERATOR SILVEY: Do you have anything?

7 MR. MATTOS: I have just a couple points of
8 clarification.

9 First, I don't want to get too far in the
10 weeds, but we're talking about the time we used to
11 measure the violations per inspection hour, and I have a
12 feeling that our friend Kenny back there in the audience
13 had a little something to do with getting that in your
14 testimony, but that's something that -- I appreciate
15 that.

16 MR. HAMILTON: I tell you over the years,
17 there's been a lot of -- it seems like POV is a place to
18 maybe flush that out a little bit, but that's raised, all
19 mines have, you know, an inspector ratio of sorts, issues
20 of violation, you know, whatever, but that has
21 historically come up periodically.

22 MR. MATTOS: But just to clarify, we do use the
23 supervisor's time and anyone who is an authorized
24 representative, we use their time. We just don't use all
25 of their time. I just wanted to clarify that.

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1 MR. HAMILTON: Is there a formula of some sort
2 that guides them?

3 MR. MATTOS: It's the way they code their time.
4 If they're there for inspection activity, that time is
5 then included and it's there, some of it --

6 MR. HAMILTON: Some or all may be part of it.

7 MR. MATTOS: It's not, but that's something we
8 need to address. I appreciate that.

9 The other thing that I wanted to clarify is we
10 have commenters talking about -- and the final order is a
11 big issue that we should only consider final orders. We
12 currently look at citations and orders issued that are
13 not fined also; we do that today in the Pattern of
14 Violation screenings.

15 It's the current role of the hazard division in
16 one part of the division that we have them look at only
17 final orders; but in other parts, we look at citations
18 and orders issued regardless of whether they are final or
19 not. I just wanted to clarify that for the record.

20 But in the beginning of your statement, Chris,
21 you said that the system needs to be simplified. Were
22 you talking about the procedures that need to be
23 simplified, the formula needs to be simplified? I mean,
24 you referenced the performance.

25 MR. HAMILTON: You know, and that might be and

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1 I'll expand on that more in the written comments. But
2 from what I understand from some of the individuals who
3 have inputted over the years -- and maybe it's that
4 institutional knowledge that's being carried forward
5 today where, you know, several years ago and I think we
6 may have made some effort to clarify that just a couple
7 years ago -- it was very difficult to understand and
8 follow procedures and protocol to try to understand how a
9 mine would ultimately become eligible and how they would
10 be notified and whether they would have an opportunity to
11 improve, and then what would follow would be a real
12 pattern.

13 So there was just a lot of confusion in trying
14 to, you know, really figure out what a mine had to do to
15 get on path. You know, the big picture was clear, but
16 when you got down into the detail of actually attempting
17 to administer the program, that's where some of the
18 confusion, I believe, came.

19 MR. MATTOS: Okay. Because you also referenced
20 the need for transparency. We have the web-monitoring
21 tool out there now. Do you think that's enough
22 transparency, that web monitoring tool, or do you think
23 there's something else needed?

24 MODERATOR SILVEY: Have you used it?

25 MR. HAMILTON: Have I used it? No, no.

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1 Unfortunately, I don't have a mine.

2 MODERATOR SILVEY: No. I meant -- I understand
3 that. I meant had you in terms of --

4 MR. HAMILTON: No. I'm not sure anyone is up
5 to the same level of knowledge and competency on what
6 does exist and how all the tools are integrated today.
7 So that could be a little bit of an issue. I mean, just
8 being efficient and more transparent as opposed to the
9 traditional, you know. We think we've just about got is
10 just principles that we embrace, the more transparent;
11 the more people can look and find out where they stand in
12 relationship with the others and the likelihood of
13 additional enforcement actions, I just think they're
14 better off.

15 MODERATOR SILVEY: Well, we know a lot of
16 people have, in fact, used that web tool because we can
17 tell -- obviously, we can look and see how many hits we
18 get on it.

19 And how many do you think?

20 MR. MATTOS: We were getting about 800 a week
21 when we first put it out. I haven't looked recently.

22 MODERATOR SILVEY: So we do know that people
23 are, in fact, using it. And I think while people have
24 made some specific comments to us, in large part, people
25 have said they have found it useful. That's why I asked

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1 have you used it because it was in the interest of
2 transparency that we develop -- I say "we," Jay and
3 people develop a web tool -- and so, therefore, I was
4 just wondering.

5 MR. HAMILTON: You know, there's just a lot of
6 concern -- I think first of all, there's just a real
7 solid appreciation for what's envisioned and what's
8 intended through the Pattern of Violations program. I
9 mean, it is a tool that I think concerns everybody,
10 particularly regulating community more so.

11 So, you know, there's just -- it's the one
12 program that everybody is just overly concerned over how
13 it may be utilized and ensure that the transparency and
14 due processes is absolutely provided because there's just
15 a lot of concern over misuse, you know, the vendetta-type
16 inspector.

17 I mean, these are concerns that everyone has,
18 the good operators and the operators that are very
19 conscious about their safety efforts, as well as the
20 people that may not have that, you know, concern. But
21 everyone wants to make sure we get this thing right and
22 that's the suggestion of, you know, taking a more
23 holistic approach on how you go about assessing basic
24 mine safety performance as opposed to just the one
25 category of violations that will always and forever be

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1 somewhat subjective.

2 MR. JONES: Has your Association done an
3 analysis of how many of your members could be potentially
4 affected by this Pattern of Violations provision?

5 MR. HAMILTON: No.

6 MODERATOR SILVEY: Okay. Thank you very much.

7 MR. HAMILTON: Thank you.

8 MODERATOR SILVEY: Does anybody else wish to
9 make comments, provide testimony? Somebody in the back
10 of the room?

11 MR. LACY: Good afternoon.

12 MODERATOR SILVEY: Good afternoon.

13 MR. LACY: Brian Lacy with United Mine Workers
14 of America -- B-R-I-A-N, L-A-C-Y.

15 The UMWA generally supports the proposed rule.
16 Things that MSHA has proposed, which we support, include
17 elimination of initial screening criteria that MSHA has
18 used to provide an operator with advanced written warning
19 about an operation being vulnerable to a Pattern of
20 Violations.

21 The operator should have an ongoing awareness
22 of the conditions in their mine and whatever shortcomings
23 exist without MSHA having to notify them that they are
24 entering a Pattern of Violations.

25 Further, MSHA started a new webpage so mine

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1 operators can track their own history and whether they
2 meet the criteria for Pattern of Violations.

3 We also agree that simplifying the POV
4 procedures and making them more transparent would support
5 the posting on the web of a mine's record, which
6 indicates whether it meets the POV criteria. With MSHA
7 monthly updating this information, the mine operator will
8 be able to keep up to date on their POV assessment.

9 A critical change to proposed language concerns
10 the removal of the current limitation that MSHA only
11 consider final orders for the purposes of POV. The
12 problem with the current system that limits a POV
13 analysis to only the final orders is that it can take
14 years to resolve a contested citation. By the time the
15 citations become final, conditions at the mine may bear
16 no resemblance to what they were when the citation was
17 originally issued.

18 Further, only considering final orders
19 encourages a mine operator to challenge everything MSHA
20 issues to avoid being placed on a Pattern of Violations.
21 Recent Congressional hearings on the backlog of cases
22 pending before the Federal Mine Safety and Health
23 Administration attests to the problem, only considering
24 final orders has created. The UMWA believes that both
25 legislative history of the Mine Act and litigation will

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1 support MSHA on this position.

2 We agree that the health and safety record of
3 each operation shall be reviewed at least every six
4 months to ensure that MSHA is keeping abreast of any
5 deterioration in health and safety conditions. We
6 believe a quarterly review would be better, but agree
7 that a six-month review would be adequate considering the
8 other responsibility that MSHA has.

9 The UMWA agrees that when the mine has a
10 Pattern of Violations, a copy of the notice must be
11 posted on the mine bulletin board in order to make sure
12 that everyone at the mine is informed that their
13 workplace exhibits substandard health and safety
14 conditions.

15 Problems we see with the proposal include this
16 proposal anticipates having MSHA periodically revise the
17 POV criteria through informal administrative action. The
18 UMWA opposes that. Instead, we believe the Agency should
19 collect and consider the comments submitted to this
20 proposed rule to set criteria for purposes of the POV.
21 The criteria should be fixed at least until an
22 opportunity for public input on any changes that may be
23 warranted in the criteria. A subsequent notice and
24 comment period should occur to allow public input should
25 the POV criteria be changed.

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1 The UMWA holds reservations about using injury
2 rates as weighted criteria for consideration in a Pattern
3 of Violations. Injury reporting depends on operator's
4 reports and the industry has long known about
5 underreporting of accidents and ,consequently, it would
6 not be a reliable statistic for consideration. Covering
7 up accidents and underreporting seems to be commonplace
8 with some of the industry. We recommend that fatality
9 rates be rated more heavily than injury rates.

10 The UMWA has reservations about a mine being
11 removed from a POV for mitigating circumstances. Many
12 questions remain open regarding this issue, such as how
13 the presence of a mitigating factor is used to remove an
14 operation from POV status, if so, for how long; and does
15 MSHA contemplate using any sort of probationary status?
16 If an operation indicates it will pursue certain
17 mitigating practices, and doesn't, then will it be placed
18 back on the POV? The union would at least ask the Agency
19 for clarification on what constitutes mitigating
20 circumstances and examples of such.

21 This concludes my testimony. I'm here on
22 behalf of the UMWA to enter our position into the record.
23 I would ask the panel if they have any questions to
24 reserve those for our Department of Occupational Health
25 and Safety staff who will testify at the June 15, 2011

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1 hearing in Arlington, Virginia. Thank you.

2 MODERATOR SILVEY: Thank you very much.

3 Just for the record, I do have a few comments
4 to yours. But I've got to remember now, I do have to
5 remember that I'll ask those of the UMWA in Arlington.

6 You said they will be testifying?

7 MR. LACY: Yes.

8 MODERATOR SILVEY: So now I've got to remember
9 that I've got to do that.

10 I will say, though, to everybody because he
11 brought up a good point -- and I want everybody here to
12 know as to the issue -- I mentioned that in my opening
13 testimony -- of mitigating circumstances.

14 He said they oppose the mine being removed from
15 a POV due to a mitigating circumstance and that he asked
16 for some clarification there.

17 Well, the concept is that once the mine meets
18 the POV specific criteria, it's too late then to come in
19 as a mitigating circumstance. The concept of mitigating
20 circumstance is that the mine operator saw that he or she
21 is approaching a Pattern of Violations.

22 So prior to meeting all the formal stuff for a
23 POV, then that mine operator would come into MSHA with
24 the safety and health management program to address the
25 conditions that the mine was seeing. I don't know if

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1 they have roof control problems or ventilation problems.
2 This program would address those types of S&S violations
3 that give rise to the pattern.

4 So as I just said, so it's not removing a mine
5 from POV consideration. We intend that to come into play
6 before a mine would be considered for a pattern, so I did
7 want to clarify that for everybody. I have a couple more
8 comments, but we will do with those in Arlington.

9 MR. LACY: Thank you.

10 MODERATOR SILVEY: Thank you.

11 MR. GALLICK: John Gallick, G-A-L-L-I-C-K,
12 Alpha Natural Resources. The proposal does not contain
13 specific criteria, but rather seeks comment on how the
14 Agency should contain comments during the development of,
15 and periodic revision to, the POV screening criteria is
16 impossible to comment on criteria that have not been
17 shared in the proposal.

18 We believe the Agency should establish a
19 comment period by notice and comment rulemaking. Section
20 104(e)(4) specifically requires that, "Secretary shall
21 make such rules as he deems necessary to establish
22 criteria for determining when a Pattern of Violations
23 exists."

24 The Office of the Inspector General also
25 specifically recommended that MSHA seek stakeholder input

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1 on the POV screening criteria in its report dated
2 September 29, 2010, on page 3 and page 24. MSHA has not
3 effectively done that in the proposed rule in our
4 opinion.

5 Section 104.2 of the proposed standard lists
6 only generic categories of the information that will be
7 reviewed, but does not quantify or explain how such data
8 will be applied to issue a pattern notice. The proposed
9 rule also apparently anticipates that the criteria will
10 be fluid and subject to change without any established
11 method for notice and comment rulemaking on the core of
12 the rule, which are the criteria.

13 This approach totally fails to provide
14 operators with notice of the criteria and apparently is
15 intended to provide MSHA with the ability to change, or
16 worse, ignore the criteria in some situations. It fails
17 to inform stakeholders on what is expected to avoid a
18 pattern notice and offers no comment on the specific
19 criteria before the rule would then become in effect.

20 The absence of the specific, critical criteria
21 from the proposal is of particular concern since the
22 proposed rule eliminates any potential for discussion of
23 the application of the criteria to a mine before the
24 pattern notice is issued to a mine operator. It appears
25 that the rule anticipates an automated process for the

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1 issuance of the pattern notice based on a mine operator's
2 monitoring of the criteria on the MSHA website. I am
3 comfortable as an employee of a large operator that we
4 can devote the resources to provide in-house monitoring
5 provided that the criteria are known and clear. I am not
6 comfortable with accepting this approach.

7 It is useful to be able to check the status of
8 each operation on the MSHA website, but the failure to
9 promulgate the actual criteria that an operator needs to
10 measure is a continuing problem. It is difficult to
11 reconcile this with the supposed consideration of
12 mitigating criteria provided for in the proposed rule
13 prior to the issuance of the notice. This would subject
14 an operator to the immediate withdrawal orders without
15 any opportunity for discussion of any means to avoid the
16 sanction or curtail its use prior to its application.

17 MSHA should reissue its proposal to include the
18 criteria that will be used in the POV process in one
19 rulemaking and to maintain a period for discussing
20 mitigating circumstances prior to an automatic issuance
21 of a pattern notice. This would be the most efficient
22 and transparent process to employ and would not adversely
23 affect the safety and health of miners. Rather, it would
24 allow for a period to correct any deficiencies before
25 subjecting a mine to this onerous sanction. For example,

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1 the current criterion relies on the number of inspection
2 hours, and we believe those hours actually need to be
3 better defined. I believe Chris spoke to that already.
4 Discrepancies have been noted in the current round of POV
5 letters on hours.

6 In similar fashion, S&S rates need to be
7 defined because in the latest round of POV letters, one
8 mine in an improvement plan had to go from a rate of 3.0
9 S&S per 100 hours to 4.88. Yeah, they had to go up.
10 That obviously was an error, but it highlights the need
11 for promulgated criteria. Promulgation of the criteria
12 itself would provide the transparency and simplicity that
13 is consistent with the Agency's and industries' goals.

14 Current 30 C.F.R. 104.3(b) states that only
15 citations, which have become final, shall be used to
16 identify mines with potential Pattern of Violations. The
17 proposed standard change is the approach that has been
18 followed since 1991 to base the pattern notice review on
19 violations issued to make future POV determinations.

20 The use of violations issued to trigger a POV
21 sanction, absent a meaningful opportunity for prior
22 independent review or a hearing is of particular concern,
23 given the deletion in the proposed rule for any prior
24 ruling of an issuance of a pattern notice and the failure
25 to set out the prescribed process to avoid issuance of a

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1 pattern notice by establishing a timeframe in which to
2 discuss mitigating factors referenced in the rules.

3 As no described criteria are articulated in the
4 proposal, it is vague and it fails to provide notice to
5 stakeholders how to avoid this notice sanction.

6 Couple this vagary with the absence of any
7 meaningful warning of the notice's impending issuance
8 renders it basically impossible to avoid. Combining
9 these disturbing shortcomings with a pattern notice based
10 on enforcement action issued rather than final orders
11 denies stakeholders of due process and makes the
12 imposition of the pattern notice prone to error resulting
13 in enforcement actions that may well be turned out to be
14 invalid down the road.

15 The standard must provide an avenue for
16 expedited hearings on contested citations that are used
17 by the Agency to list an operation as a Pattern of
18 Violations. Ideally, this expedited hearing would also
19 be coupled with the restart of meaningful management
20 conferences for all operations. It is imperative that
21 operators know that prior to being subjected to the most
22 onerous enforcement tool in the MSHA tool box, they have
23 a right to make their arguments concerning citations that
24 the operator believes has been poorly evaluated.

25 I have carefully tracked the contests of my

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1 company's contested citations, and I see the gravity
2 routinely overwritten. I see resolutions where as many
3 as 50 percent of the S&S designations we receive are
4 deleted in litigation or settlement. That does not make
5 one feel comfortable that relying on citations issued is
6 acceptable. We agree with NMA's concerns expressed in
7 their comments on the unreliability of the application of
8 the criteria.

9 According to information released by MSHA's
10 Office of Assessments on January 31, 2011, almost 19
11 percent of the violations issued as Significant and
12 Substantial, which were litigated in fiscal years 2009
13 and 2010 were vacated or modified to non-Significant and
14 Substantial as a result of the litigation process.

15 Similarly, when Section 104(d) violations,
16 which alleged an unwarrantable failure to comply were
17 litigated in the same period, almost 33 percent of those
18 violations were either vacated or modified to Section
19 104(a) violations. Clearly, relying on violations issued
20 to impose the punitive sanction of Section 814(e) of the
21 Mine Act could well result in erroneous application of
22 the pattern enforcement.

23 Further, we believe that any criterion that
24 takes into consideration Section 107(a) orders is
25 inappropriate. First, imminent dangers may not be linked

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1 to occurrence of violations. They often result from
2 natural events that cannot be controlled.

3 In addition, the elimination of a process where
4 an operator is given a chance to improve is contrary to
5 any concept of fairness. It renders the POV solely one
6 of punishment, with no opportunity for redemption. No
7 operator who gets the POV will get off in my view, absent
8 closing the mine. That is not what the Agency or the
9 industry or labor should strive for.

10 That was my written comments. I have some
11 extemporaneous comments based on your questions. I want
12 to talk briefly about the mitigation process.

13 My concern there, and I heard what you had to
14 say, Pat, and my concern is this. Until I have clearly
15 adjudicated any violations that are part of getting me to
16 the POV, I shouldn't have to present the mitigation
17 process because mitigation processes by definition -- and
18 I looked at them; you call them the health and safety
19 management. But the ones that I've seen have required
20 the operator to do multiple extra examinations of
21 electrical cables via his chief maintenance foreman, for
22 example. That is in one of the documents I have seen.

23 Those things are burdensome to the operator if
24 he is not, in fact, a pattern potential mine. The only
25 way he'll know that is if his litigation is completed,

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1 and if he fails, then his plan needs to go forward. And
2 if he's successful, then, obviously, he should not be
3 subjected to an extra burden of requirements the plans
4 will put on him.

5 We've all talked about this issue, the one-year
6 violation versus final orders. I mean, that's been back
7 and forth and I'm sure every hearing you're going to go
8 to, you're going to debate that. I look at it this way.
9 I'm sort of in the balancing of it. I like the idea of
10 using present day citations, that's what the mine looks
11 like in the last year, you know, versus final orders.
12 I'm dealing in final orders for 2007, 2008, 2009.

13 We may be doing much better now or much worse;
14 we may be shut down. We have mines shut down and we
15 still get a stack of orders, but the ultimate unfairness
16 of using last year's violation records without having a
17 litigation process in place is that it is essentially --
18 we are now essentially writing POV on the actions of a
19 few inspectors.

20 I'll give you an example. A mine had a
21 potential POV letter; they had the 90 days to improve.
22 They were given the opportunity to not necessarily
23 litigate, but to meet with the District Manager on the
24 violations that they believed were improperly written.
25 They were successful to the percentage they dropped off

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1 the letter completely. Had that interim step not been
2 done by the District Manager, and it's not in any rule,
3 had that next step of saying I'll meet with you and we'll
4 talk about the paper that you think was improperly
5 issued, had that not been available to that operator,
6 that operation would have probably gone to the next step,
7 which is POV.

8 It's very important that any operator -- if you
9 want to use the latest and newest violations over the
10 last year, which is the way I think the present system is
11 in place, then you have to provide means of adjudication,
12 whether it be management conferences as step one, which I
13 think is the first logical step one, and step two,
14 litigating in front of a judge, get expedited hearings.

15 MSHA has asked that solicitors file for
16 expedited hearings on cases in which they wanted to push
17 POV and was able to get them. Basically, we're unable to
18 get -- we're almost unable to get expedited hearings in
19 today's world. But I believe if you put it into a rule,
20 there would be no -- it would be part of the standard.
21 You're not on POV until you have your hearing on the
22 cases that you contested.

23 Percent of change, you know, the statistics are
24 all over the place. But basically when you litigate --
25 we don't contest all violations. So when you contest

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1 them, you like to believe that at least we believe we're
2 right on the majority that we're contesting or else we
3 wouldn't have contested them. You know, let's take that
4 as a given. I know you can argue that point. The data
5 says one out of five S&S violations that are contested
6 and finally reach some settlement are reduced to at least
7 a 104(a) violation and non-S&S. Unwarrantable is 33
8 percent. That's a significant change.

9 Now, when you look at the total violations,
10 obviously, the percentage goes down because we don't
11 contest them. You know, for the 100,000 violations
12 written in the country, 30,000 contested or whatever. So
13 you know -- but when you're running that closely to a
14 pattern in a one-year window in a mine where you can
15 ratchet down the criteria to whatever number we have in
16 the rule, basically whatever number the administrator or
17 the assistant secretary or whoever does that, you know,
18 can ratchet down to whatever number, you want to make
19 sure that at least that operator has the ability to have
20 his day in court. It's only fair. It's only fair.

21 As far as the website tool, I think it's a
22 pretty good tool, Jay. I don't have any real problems
23 with it. We do use it. And I know that you've had, you
24 know, like any other thing, there's, you know, things
25 that will get better on it, but it does offer a tool to

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1 look at numbers. And, clearly, that's our goal to deal
2 with the issues before it would get to a POV level. But
3 you know if the violations are being written improperly,
4 we would like to have an opportunity to have a hearing
5 before we ever get there; before we ever get the letter;
6 before we have to go to litigation; before we have to
7 submit a health and safety plan; before we have to do any
8 of the additional above-the-law standards. We want to be
9 able to say we feel that this was a fair adjudication and
10 that takes somebody -- that takes somebody to provide a
11 hearing. That's my extra comments.

12 MODERATOR SILVEY: Okay.

13 I want to just ask you one thing and that is --
14 and for everybody -- obviously, you know that from the
15 proposed rule, we advanced our position somewhat in the
16 Public Hearing Notice with respect to a specific
17 criteria, and that's the only thing I'm talking about.
18 And then the proposed rule, we had that statement, just
19 like you said in there that we were soliciting comment on
20 how we should obtain feedback from, and periodic revision
21 to, a specific criteria.

22 In the Public Hearing Notice, we said, you
23 know, today, if we were to stop things in time today,
24 we've got specific criteria on the website or I can refer
25 to it as the former. Well, what we said in the Public

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1 Hearing Notice is that we would -- before we review a
2 mine for a Pattern of Violation and before we make any
3 change to that specific criteria that we used to date,
4 before we make any change to it to review a mine, we
5 would post that criteria, the specific criteria, we would
6 take stakeholder input into it. Then we would respond to
7 stakeholder input.

8 We might use some stakeholder input and revise
9 the specific criteria, but then we would post on the
10 website our response to the stakeholders, as well as any
11 revised specific criteria, we would post that on the
12 website before we would ever use it in the review of a
13 mine for a POV.

14 What's your response to that? How do you see
15 that?

16 MR. GALLICK: Well, I think it gets to the
17 point of posting and letting me know in advance what the
18 criteria are going to be, obviously.

19 MODERATOR SILVEY: And allowing you the
20 opportunity to respond to comments.

21 MR. GALLICK: Right. My view is that my
22 comments and response on most public notices aren't --
23 I'll just say the percentage of our comments on changes
24 and my comments on changes are rarely accepted, so my
25 view is I would rather see it in a more formal

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1 rulemaking. I think it leaves the Agency with too much
2 latitude to establish a rule based on -- you know, you
3 can go as paranoid as saying do you find a mine you think
4 ought to be on pattern and make sure the criteria -- pick
5 that up or do you go saying different Agency leaders will
6 have different views of what is important.

7 You know, in previous conversations, we talked
8 about the legislation action on the Hill and, clearly,
9 when you were spending time talking to different
10 legislative people, obviously, some people were very
11 strongly driven towards citations, S&S, and various
12 things. Others were driven more towards acts of
13 prevention, which are accident rates, which are severity
14 rates, that type of thing.

15 I would say that, again, when it's not in a
16 rulemaking, a person who is determining what the criteria
17 are going to be for the next cycles or next whatever,
18 that weight would be if I were sitting in that seat, I
19 would be weighing accident prevention stronger than
20 citable stuff. Take another person, they're going to go
21 in the other direction. You know, so that bothers me.
22 I can throw all the inputs in you want, but if you're
23 predisposed to believe that citations is the driving
24 force, you know, and I've heard people say -- I've heard
25 a lot of reasons why you could argue any of those points.

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1 But if I'm predisposed to believe whatever I believe and
2 I am predisposed to believe what I believe, therefore I
3 would then say, no, I think I will stick with what I
4 believe. Whereas if it's a rulemaking, it is what it is.

5 MR. MATTOS: Just one comment on that as part
6 of this rule. We really have to pay attention to the
7 Mine Act, as a pattern of S&S violations, so we really
8 have to keep that the core of what we're doing under the
9 current Mine Act. That's just a comment.

10 But, John, you mentioned the example of the one
11 mine where S&S during the last go-round where it actually
12 could have gone up, and it would not have been a Pattern
13 of Violation. And if I recall, that operation had some
14 unwarrantable failure citations or as it became final,
15 that's how they got on the list. And --

16 MR. GALLICK: Fortunately, it was not mine.

17 MR. MATTOS: No, it was not yours.

18 But the reason I bring that up is this is the
19 second go-round with the formula of criteria that we are
20 using for patterns of violations. And in each, there
21 arguably have been pluses and minuses, a couple of
22 minuses each time.

23 The example that mine shows, okay, the current
24 criteria probably needed some kind of loophole plugged in
25 that criteria. So if we get another set of criteria and

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1 we come out with them; we put them in a rule; we go and
2 we have another one of these operations where we need to
3 tweak this thing, we'll all be sitting here again, but
4 we'll be required to use that criteria.

5 So how would we get around that? That's my
6 question. It's a long-winded question.

7 MR. GALLICK: It's a legitimate question. I'm
8 not sure how you get around it. But it seems to me that
9 there's no question rulemaking is slow, but because it is
10 a slow process, it gives people opportunity to think
11 about it and work on it.

12 And I look back -- when you asked the question,
13 Pat, the only similar action -- and I can remember, would
14 not be proposed in the proposed rule was when we were all
15 given the opportunity for your policy on tracking and
16 communications, and we all had only a short period of
17 time to write a bunch of comments. And I can remember
18 putting pages and pages of comments on what I would
19 change. I also remembered none of them were accepted,
20 but it was clear to me that the assistant secretary or
21 whomever had his -- just like I would've had -- had his
22 goal in mind of what he thought was needed and that's
23 what we got.

24 There wasn't an ability to sit down in a
25 roundtable discussion even and maybe when you make your

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1 stakeholder thing, it can't be as antiseptic as written
2 comments back and forth, maybe you need to say some type
3 of roundtable. I don't know what the answer would be
4 either, but some way of getting that give-and-take.
5 That's why I don't think that makes sense.

6 I would've liked to have thought that if we had
7 that type of thing on tracking communications, we would
8 have worked the section issues out more logically, but it
9 was like we wrote comments and we got on some date,
10 here's the final proposal. That's my concern about what
11 you said. You've got to have that back and forth give-
12 and-take.

13 MODERATOR SILVEY: I hear you and I appreciate
14 that and that, obviously, communication and tracking is
15 not --

16 MR. GALLICK: No, no. I use that as an example
17 of the only one I remembered us doing that.

18 MODERATOR SILVEY: That's illustrative. I will
19 add since we're talking about it, the only problem with
20 that, not in defense of MSHA is that we were up against a
21 Congressional mandate with a timetable. I mean, we all
22 know that. Sometimes when you don't have the most
23 optimum circumstance, then you would sort of push to do
24 things that under other circumstances, you might engage
25 in another process. I appreciate what you're saying.

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1 MR. GALLICK: Right. All I'm saying is I think
2 you have to have that give-and-take, number one. Number
3 two, recognize that, unfortunately, this could be the
4 same kind of pressure if we unfortunately have something
5 go wrong in the industry and the political pressure,
6 Congressional pressures, has all that happening.

7 MODERATOR SILVEY: Okay. Thank you.

8 MR. GALLICK: Thank you.

9 MODERATOR SILVEY: Anybody else? Yes?

10 MR. MURRAY: Kenny Murray from Alliance Coal.
11 Just to -- not to beat a dead horse, but for
12 kind of a point of clarification on Mr. Hamilton's
13 remarks on supervisory time --

14 MODERATOR SILVEY: Are you his --

15 MR. MURRAY: I'm his follower.

16 MODERATOR SILVEY: I'm just -- go on.

17 MR. MURRAY: We've been talking about this for
18 a long time. And as you well know, the expectations of
19 the MSHA top staff have indicated that the supervisors
20 should spend more time. As a matter of fact, they're
21 mandated to spend time, more time, frequently underground
22 and onsite. And we felt that whether they're there for
23 field reviews or conducting inspections, that Section 104
24 doesn't distinguish between administrative time, that
25 they have a clear obligation under 104 to issue a

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1 citation if they're observed by -- I'm not talking -- any
2 card carrying representative has that obligation under
3 the Mine Act, therefore, his time should be counted.

4 You know, if he's there as a mentor, it
5 actually increases the amount of citations that get
6 written. I mean, maybe it's subconsciously or human
7 nature, but we think that it has an impact on total
8 inspector hours, and we think that's consistent with
9 104(a) of the Mine Act.

10 Thanks for the clarification, Mr. Mattos. The
11 other thing, the web tool that you talked about, it's
12 excellent.

13 MODERATOR SILVEY: You got one good review.

14 MR. MURRAY: As a matter of fact, internally,
15 we have our IT folks monthly, it comes out about the 15th
16 or 16th, it updates them for the previous month. They're
17 charged with graphically illustrating for each operation
18 and sending that to the responsible party. So we do use
19 it and we thank you for hearing our expressions.

20 MODERATOR SILVEY: And you use it as a
21 proactive tool?

22 MR. MURRAY: That's correct.

23 MODERATOR SILVEY: To be preventive.

24 MR. MURRAY: Yeah. We don't wait for the end
25 of the year or the end of the quarter. On the 16th, we're

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1 vigilant on what happened the previous month, so thanks
2 for that.

3 MR. MATTOS: And that 25 percent reduction in
4 assessments for that remark will be --

5 MR. MURRAY: But we appreciate that and we
6 recognize your efforts on that.

7 MR. MATTOS: Thanks.

8 MODERATOR SILVEY: Okay. Thank you.

9 Anybody else? Anybody else?

10 (No response.)

11 MODERATOR SILVEY: Well, if nobody else wishes
12 to present testimony, then I will bring this hearing to a
13 close.

14 Before I do, I want to again say that we at the
15 Mine Safety and Health Administration appreciate your
16 participation in this public hearing.

17 Again, I want to thank everybody who made
18 presentations, but I also want to thank the people who
19 attended the hearing and did not make a presentation. We
20 appreciate that because that shows us you're interested
21 in the rulemaking.

22 All comments, as we stated earlier, are due by
23 June 30th, 2011. MSHA will take your -- I ask again that
24 if at all possible, please be specific in any
25 alternatives that you might recommend to the Pattern of

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1 Violations proposed rule. MSHA will take your comments
2 and your concerns into consideration and develop a final
3 ruling.

4 We encourage you to participate and continue
5 participation in this rulemaking and the examinations of
6 work areas rulemaking, and in any future MSHA rulemaking.

7 At this point, this public hearing is
8 concluded. Thank you very much.

9 (Whereupon, at 12:58 p.m., the hearing in
10 the above-entitled matter was concluded.)

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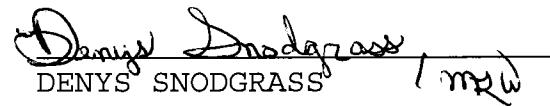
REPORTER'S CERTIFICATE

CASE TITLE: Patterns of Violations
HEARING DATE: June 7, 2011
LOCATION: Charleston, West Virginia

I hereby certify that the proceedings and evidence are contained fully and accurately on the audio and notes reported by me at the hearing in the above case before the Department of Labor, Mine Safety & Health Administration.

Date: June 7, 2011

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DENYS SNODGRASS / msw
(Official Reporter)

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REQUEST TO SPEAK

Pattern of Violations

Hearing
Charleston, West Virginia

June 7, 2011

	Name	Organization	Contact Info.
1.	<u>Brian Lacy</u>	<u>UMWA</u>	<u>(304) 343-0259</u>
2.	<u>John Gallick</u>		
3.	<u>Kenny Murray</u>		
4.	<u>Chris Hamilton</u>		
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			

AB73-PH-2A

SIGN-IN SHEET

Pattern of Violations

Hearing
Charleston, West Virginia

June 7, 2011

	Name	Organization	Contact Info.
1.	<u>Frank Foster</u>	<u>Patwest Coal</u>	<u>304-369-8150</u>
2.	<u>Tom J. J.</u>	<u>4 P</u>	
✓ 3.	<u>Kerry Murray</u>	<u>ALLIANCE COAL</u>	<u>859-475-3445</u>
4.	<u>DON MCBRIDE</u>	<u>STATE OF ILLINOIS</u>	<u>618 521 8014</u>
5.	<u>Greg Ritchie</u>	<u>U.M.W.A</u>	<u>304-294-4030</u>
6.	<u>ROBERT WADE</u>	<u>U.M.W.A</u>	<u>304-448-3541</u>
7.	<u>Ronald Pauley</u>	<u>UMWA</u>	<u>(304) 881-3418</u>
8.	<u>John Gallick</u>		
✓ 9.	<u>Chris Hamilton</u>		
✓ 10.	<u>Brian Lacy</u>		
11.	<u>John Gallick</u>		
12.	<u>Ronald Pauley</u>		
13.	<u>Frank Foster</u>		
	<u>John Gallick</u>		

COMMENTS ON PROPOSED RULE ON PATTERN OF VIOLATIONS

This proposal does not contain specific criteria, but rather seeks comment on how the agency “should obtain comments on how the agency should obtain comment during the development of, and periodic revision to, the POV screening criteria.” 76 Fed. Reg. 5719, 5720 (February 2, 2011). It is impossible to comment on criteria that have not been shared in the proposal. We believe that the agency must establish the POV criteria by notice and comment rulemaking. Section 104(e)(4), 30 U.S.C. § 814(e)(4), specifically requires that the “... Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations ... exists.” The Office of Inspector General also specifically recommended that MSHA seek stakeholder input the POV screening criteria in its report dated September 29, 2010, pages 3, 24. MSHA has not effectively done that in the proposed rule.

Section 104.2 of the proposed standard lists only generic categories of information that will be reviewed, but does not quantify or explain how such data will be applied to issue a pattern notice. The proposed rule also apparently anticipates that the criteria will be fluid and subject to change without any established method for notice and comment rulemaking on the core of the rule which are the criteria. This approach totally fails to provide operators with notice of the criteria and apparently is intended to provide MSHA with the ability to change, or worse, ignore the criteria in some situations. It fails to inform stakeholders on what is expected to avoid a pattern notice and offers no comment on the specific criteria before the rule becomes effective.

The absence of the specific, critical criteria from the proposal is of particular concern since the proposed rule eliminates any potential for discussion of the application of the criteria to a mine before the pattern notice is issued to a mine operator. It appears that the rule anticipates an “automated” process for the issuance of the pattern notice based on a mine operators monitoring of the criteria on MSHA’s website. I am comfortable, as an employee of a large operator that we can devote the resources to provide in-house monitoring provided the criteria are known and clear. I am not comfortable with accepting this approach. It is useful to be able to check the status of each operation on the MSHA website but the failure to promulgate the actual criteria that an operator needs to measure is a problem. It is difficult to reconcile this with the supposed consideration of “mitigating” criteria provided for in the proposed rule prior to the issuance of the notice. This would subject an operator to the immediate withdrawal orders without

any opportunity for discussion of any means to avoid the sanction or curtail its use prior to its application.

MSHA should reissue its proposal to include the criteria that will be used in its POV process in one rulemaking and to maintain a period for discussing mitigating circumstances prior to an automatic issuance of a pattern notice. This would be the most efficient and transparent process to employ and would not adversely affect the safety and health of miners. Rather, it would allow for a period to correct any deficiencies before subjecting a mine to this onerous sanction. For example, the current criterion relies on the number of inspection hours and we believe what those hours actually are must be defined. Discrepancies have been noted in the current round of POV letters.

In similar fashion, S&S rates need to be defined because in the latest round of POV letter one mine in its improvement plan had to go from a rate of 3.0 S&S/100 hours to 4.88. Yes, they had to go up. That obviously was an error but it highlights the need for promulgated criteria. Promulgation of the criteria itself would provide the transparency and simplicity that is consistent with the agency's and industry's goals.

Current 30 C.F.R. § 104.3(b) states that only citations and orders which have become final shall be used to identify mines with a potential pattern of violations. The proposed standard changes this approach that has been followed since 1991 to base the pattern notice review on "violations issued" to make future POV determinations.

The use of "violations issued" to trigger the POV sanction, absent a meaningful opportunity for prior independent review or a hearing, is of particular concern given the deletion in the proposed rule of any prior warning of the issuance of pattern notice and the failure to set out a proscribed process to avoid the issuance of the pattern notice by establishing a time frame within which to discuss mitigating factors referenced in the rules. As no proscribed criteria are articulated in the proposal, it is vague and fails to provide notice to stakeholders of how to avoid this onerous sanction. Coupling this vagary with the absence of any meaningful warning of the notice's impending issuance renders it basically impossible to avoid. Combining these disturbing short-comings with a pattern notice based on enforcement action issued, rather than final orders, denies stakeholders of due process and makes the imposition of the pattern notice prone to

error resulting in withdrawal orders and enforcement actions that may well be invalid.

The standard must provide an avenue for expedited hearings on contested citations that are used by the agency to list an operation as a Pattern of Violation mine. Ideally this expedited hearing provision would also be coupled with the restart of meaningful Manager's Conferences for all operations. It is imperative that operators know that prior to being subjected to the most onerous enforcement tool in the MSHA tool bag they have a right to make their arguments concerning citations that the operator believes has been poorly evaluated.

I have carefully tracked the contests of my company's contested citations and I see the gravity routinely overwritten and I see resolutions where as many as 50% of the S&S designations we receive are deleted in litigation or settlement. That does not make one feel comfortable that relying on citations issued is acceptable. We agree with NMA's concerns expressed in their comments on the unreliability of the application of the criteria.

According to information released by MSHA's Office of Assessments on January 31, 2011, almost 19% of the violations issued as "significant and substantial" which were litigated in fiscal years 2009 and 2010 were vacated or modified to "non-significant and substantial" as a result of the litigation process.

Similarly, when § 104(d) violations, which alleged an "unwarrantable failure" to comply were litigated in the same period, almost 33% of those violations were either vacated or modified to a § 104(a) violation. Clearly, relying on "violations issued" to impose the punitive sanction of § 814(e) of the Mine Act could well result in erroneous application of the pattern enforcement.

Further, we believe that any criterion that takes into consideration Section 107(a) orders is inappropriate. First, imminent dangers may not be linked to the occurrence of violations. They often result from natural events that cannot be controlled.

In addition, the elimination of a process where an operator is given a chance to improve is contrary to any concept of fairness. It renders the POV solely one of punishment with no opportunity for redemption. No operator who gets the POV will get off in my view, absence closing the mine. That is not what the agency or the industry or labor should strive for.

Pattern of Violations
Proposed Rule Hearing
Charleston, WV
June 7, 2011

Brian Lacy
United Mine Workers of America
(UMWA)

The UMWA generally supports the proposed rule. Things that MSHA has proposed which we support include:

- Elimination of initial screening criteria that MSHA has used to provide an operator with an advanced written warning about an operation being vulnerable to a pattern of violations. The operator should have an on-going awareness of the conditions in their mine and whatever shortcomings exists without MSHA having to notify them that they are nearing a Pattern of Violations. Further, MSHA started a new webpage so mine operators can track their own history and whether they meet the criteria for a pattern of violations.
- We also agree with simplifying the POV procedures and making them more transparent. We support the posting on the web of a mine's record which indicates whether it meets the POV criteria. With MSHA monthly updating this information, the mine operator will be able to keep up to date on their POV assessment.
- A critical change to the proposed language concerns the removal of the current limitation that MSHA only consider "final" orders for purposes of POV. The problem with the current system that limits a POV analysis to only final orders is that it can take years to resolve a contested citation. By the time the citation become final, conditions at the mine may bear no resemblance to what they were when the citation was originally issued. Further, only considering final orders encourages a mine operator to challenge everything MSHA issues to avoid being placed on a Pattern of Violations. Recent Congressional hearings on the backlog of cases pending before the Federal Mine Safety and Health Administration attest to the problem only considering final orders has created. The UMWA believes that both legislative history of the Mine Act and litigation will support MSHA on this position.
- We agree that the health and safety record of each operation should be reviewed at least every six months to ensure that MSHA is keeping abreast of any deterioration in health and safety conditions. We believe a quarterly review would be better, but agree that a six month review would be adequate considering the other responsibilities MHSAs has.
- The UMWA agrees that when a mine has a pattern of violations, a copy of the notice must be posted on the mine bulletin board in order to make sure everyone at the mine is informed that their workplace exhibits substandard health and safety conditions.

Problems we see with the proposal include:

- This proposal anticipates having MSHA periodically revise its POV criteria through informal administrative action. The UMWA opposes that. Instead, we believe the Agency should collect and consider the comments submitted to this proposed rule to set criteria for purposes of a POV. The criteria should be fixed at least until an opportunity for public input on any changes that may be warranted in the criteria. A subsequent notice and comment period should occur to allow public input should the POV criteria be changed.
- The UMWA holds reservations about using injury rates as a weighted criteria for consideration in a Pattern of Violations. Injury reporting depends on the operator's reports and the industry has long known about under reporting of accidents, consequently it would not be a reliable statistic for consideration. Covering up accidents and under reporting seems to be commonplace with some in the industry. We recommend that fatality rates be weighted more heavily than injury rates.
- The UMWA has reservations about a mine being removed from a POV for "mitigating circumstances." Many questions remain open regarding this issue such as:

How will the presence of mitigating factors remove an operation from POV status?
If so, for how long?

Does MSHA contemplate using any sort of probationary status?

If an operation indicates it will pursue certain mitigating practices, but then reneges will it be placed back on the POV?

The Union would at least ask the Agency for clarification of what constitutes a "mitigating circumstance" and examples of such.

This concludes my testimony. I am here on behalf of the UMWA to enter a position into the record. I would ask the panel if they have any questions to reserve those for our Department of Occupational Health and Safety Staff who will testify at the June 15, 2011 hearing in Arlington, VA. Thank you.

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
PATTERN OF VIOLATIONS)

Pages: 1 through 57
Place: Birmingham, Alabama
Date: June 9, 2011

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AB73-PH-3

IN THE MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
PATTERN OF VIOLATIONS)

Birmingham, Alabama

Thursday
June 9, 2011

APPEARANCES

MSHA Panel: PATRICIA W. SILVEY, JAY MATTOS,
CHERIE HUTCHISON, ANTHONY JONES

Speakers:

TRUMAN CHIDSEY, Director of Corporate Safety
Services, Vulcan Materials Company

RICK STEISKAL, National Aggregates USA, National
Stone, Sand & Gravel Association

MARK ESLINGER, General Safety Manager Five Star
Mining, Inc./Black Panther Mining, LLC

THOMAS WILSON, UMWA, International Health &
Safety Representative

JAMES BLANKENSHIP, UMWA, Local 2245 President,
Walter Energy Number 4 Mines of Brookwood, Alabama

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1 P R O C E E D I N G S

2 (12:30 p.m.)

3 MODERATOR SILVEY: Good afternoon. My name is
4 Patricia Silvey, and I'm the Deputy Assistant Secretary
5 for Operations for the Mine Safety and Health
6 Administration.

7 I will be the moderator of this public hearing
8 on MSHA's proposed rule for Pattern of Violations.

9 On behalf of Assistant Secretary Joseph A.
10 Main, I would like to welcome all of you here today. I
11 would like to introduce members of the MSHA panel. To my
12 left, Jay Mattos, who is Chair of the Pattern Rulemaking
13 Committee; to my right, Cherie Hutchison, who is with
14 MSHA Standards Office; and to her right, Anthony Jones,
15 with the Department of Labor, Office of the Solicitor.

16 In response to requests from the public, MSHA
17 is holding public hearings on its Pattern of Violations
18 proposed rule. This is the third of four public hearings
19 on the proposal. The first hearing was in Denver,
20 Colorado on June 2nd; the second in Charleston, West
21 Virginia on June 7th; and the next hearing will be in
22 Arlington, Virginia on June 15th.

23 The Pattern of Violations proposal applies to
24 all mines, coal and metal and nonmetal, surface and
25 underground.

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1 The purpose of this hearing is to receive
2 information from the public that would help MSHA evaluate
3 the requirements in the proposal and produce a final rule
4 that will improve safety and health conditions in mines.

5 As many of you know, the hearings will be
6 conducted in an informal manner. Formal Rules of
7 Evidence will not apply. The hearing panel may ask
8 questions of speakers, and speakers may ask questions of
9 the panel. Speakers and other attendees may present
10 information to the court reporter for inclusion in the
11 rulemaking record.

12 The post hearing comment period for this
13 proposed rule ends on June 30th. MSHA must receive your
14 comments by midnight, Eastern Daylight Savings Time, on
15 that date.

16 We ask that everyone in attendance sign on the
17 attendance sheet, and I think that everybody probably has
18 done that.

19 If you have a hard copy or a electronic version
20 of your presentation, please provide the court reporter
21 with a copy.

22 MSHA is proposing to revise the Agency's
23 existing regulation for Pattern of Violations. MSHA
24 determined that the existing Pattern of Violations
25 regulation does not adequately achieve the intent of the

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1 Federal Mine Safety and Health Act of 1977, or the Mine
2 Act. Congress included the provision in the Mine Act so
3 that operators would manage safety and health conditions
4 at mines and find and fix the root causes of "Significant
5 and Substantial," or S&S, violations to protect the
6 safety and health of miners. Congress intended that MSHA
7 use the Pattern of Violations provision to address
8 operators who have demonstrated a disregard for the
9 safety and health of miners.

10 MSHA intended that the proposal would simplify
11 the existing Pattern of Violations criteria, improve
12 consistency in applying the pattern criteria, and more
13 adequately achieve the statutory intent. The proposal
14 would also encourage chronic violators to comply with the
15 Mine Act and MSHA's safety and health standards.

16 MSHA has requested comments from the mining
17 community on all aspects of the proposed rule and is
18 particularly interested in comments that are addressing
19 alternatives to key provisions in the proposal. The
20 Preamble discusses the provisions in the proposal and
21 includes a number of specific requests for comment and
22 information. MSHA asks that commenters be specific in
23 their comments and submit detailed rationale and
24 supporting documentation for suggested alternatives.

25 The proposed rule would include general

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1 criteria and would provide that the specific criteria
2 used in the review to identify mines with a pattern of
3 S&S violations would be posted on MSHA's web site.

4 In the Preamble to the proposal, MSHA requested
5 suggestions on how the Agency should obtain comments from
6 mine operators and miners during the development of and
7 periodic revision to the specific POV criteria.

8 MSHA also requested comments on the best
9 methods for notifying mine operators and the mining
10 public of changes to these specific criteria. In the
11 public hearing notice, MSHA clarified its proposal and
12 stated that any change to the specific criteria would be
13 made available to the public for comment via posting on
14 the Agency's web site before MSHA uses it to review a
15 mine for a Pattern of Violations. MSHA would then review
16 and respond to comments, revise, if appropriate, the
17 specific criteria, and post the Agency's response and
18 enter revised specific criteria on the Agency's web site.

19 MSHA requests comments on this proposed
20 approach to obtaining public input into revisions to the
21 specific criteria -- to the specific Pattern of
22 Violations criteria. As -- MSHA also requested comments
23 on the burden that monitoring a mine's compliance record
24 against the proposed POV specific criteria using the
25 Agency's web site would place on mine operators.

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1 As many of you know, MSHA has developed a web
2 tool to make it easier for mine operators to monitor
3 their compliance. In the interest of transparency, MSHA
4 developed this web tool whereby mine operators could just
5 put in -- or anybody, for that matter, any member of the
6 public could put in a mine ID number and then the
7 information would be populated on that mine to show a
8 mine how close it was coming to approaching the Pattern
9 of Violations specific criteria.

10 MSHA asks that commenters give us their
11 reaction to the web tool and include detailed rationale
12 and supporting documentation for any comments or
13 suggested alternatives.

14 Under the proposal, to be considered as a
15 mitigating circumstance, the proposal would provide that
16 an operator may submit a written safety and health
17 management program to the District Manager for approval.
18 MSHA would review the program to determine whether the
19 program's parameters would result in meaningful,
20 measurable, and significant reductions in S&S violations.

21 MSHA would like to clarify that the Agency did
22 not intend that the Safety and Health Management Program
23 referenced in this proposal be the same as that
24 referenced in the Agency's rulemaking on comprehensive
25 safety and health management program. I think that some

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1 members of the public have gotten that confused, but
2 those are two different safety and health management
3 programs.

4 The safety and health management program under
5 this proposal would be one that would be applicable to
6 the significant and substantial violations that a mine
7 would be experiencing at that particular mine. And to be
8 considered a mitigating circumstance, that safety and
9 health management proposal would have to include
10 measurable benchmarks for abating the specific violation
11 that could lead to a Pattern of Violations, and it would
12 also address specific conditions at that mine.

13 MSHA requested detailed information and data on
14 the cost benefits and feasibility of implementing the
15 proposed provision. As you address the proposed
16 provision, either in your testimony today or in written
17 comments, please be as specific as possible as how these
18 changes would affect the safety and health of miners. If
19 you have specific alternatives, provide your rationale.

20 MSHA will make available a transcript of each
21 public hearing approximately two weeks after completion
22 of the hearing. You may review the transcripts on
23 www.regulation.gov and on MSHA's web site.

24 We will now begin the testimony. Please begin
25 clearly by stating your name and organization and

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1 spelling your name for the court reporter so that we may
2 have an accurate record.

3 Our first speaker today is Truman Chidsey with
4 Vulcan Materials.

5 MR. CHIDSEY: Good morning.

6 MODERATOR SILVEY: Good morning.

7 MR. CHIDSEY: Let me apologize in advance.

8 I've been fighting a persistent cough; and, hopefully, I
9 can get through this without interruption.

10 My name is Truman Chidsey. It's T-R-U-M-A-N,
11 C-H-I-D-S-E-Y. And I'm the Director of Corporate Safety
12 Services for Vulcan Materials Company. I appreciate the
13 opportunity to provide comments concerning the proposed
14 rule on the Pattern of Violations.

15 Vulcan Materials, based here in Birmingham,
16 Alabama, is the nation's largest producer of construction
17 aggregates, a major producer of other construction
18 materials, including asphalt and ready-mix concrete, and
19 a leading producer of cement in Florida.

20 Vulcan currently operates 255 active MSHA-
21 regulated facilities across the country. Although Vulcan
22 fully supports the position that operators who repeatedly
23 violate mandatory safety and health standards should face
24 appropriate sanctions, MSHA's proposed rules contain
25 modifications to the existing regulations, which we find

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1 objectionable.

2 MSHA has done a commendable job of creating a
3 POV single-source page on its web site, whereby an
4 operator can view the current potential POV criteria, as
5 well as view an evaluation of the mine's potential of
6 being considered for a potential POV. However, Vulcan
7 believes that the specific POV criteria to be used for
8 selecting operators for POV should be detailed in the
9 proposal itself. These criteria are not simply guidance,
10 but are intended to be binding criteria that will
11 determine whether mines are subject to substantially
12 increased enforcement.

13 It is essential that the criteria not be a
14 moving target, especially if the operators are expected
15 to monitor their own performance to avoid POV status.
16 Vulcan does not support the proposed rule in which the
17 current provision allowing for potential POV notification
18 of a facility has been deleted. This notification allows
19 an opportunity for remedial steps to be taken, as well as
20 an opportunity for the operator to meet with a District
21 Manager to review the basis for a potential POV
22 designation.

23 If there are inaccuracies, irreparable harm can
24 come to operators erroneously placed into a pattern when
25 their operation's citation history doesn't warrant it.

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1 As MSHA notes, Congress intended for the POV program to
2 apply to mine operators with a record of repeated S&S
3 violations who have not responded to the Agency's other
4 enforcement efforts. Vulcan is concerned that the
5 proposed rule does not adequately reflect the legislative
6 intent that POV is intended for circumstances of repeated
7 violations by unresponsive operators, rather MSHA's
8 criteria based on multiple violations. Thus, under the
9 current proposal, a facility can be placed in potential
10 POV status as a result of a single inspection with
11 multiple citations or as a result of one or two
12 inspections with few citations followed by one with a
13 large number of citations. However, a facility is not
14 currently placed into full POV status unless it fails to
15 improve its performance over a period of time.

16 If there is to be no official potential POV
17 status under the proposed rule, the problem is that it
18 may be difficult, if not impossible, for a mine operator
19 to determine if a facility is threatened with POV status.
20 This is clearly not the Congressional intent of the POV,
21 and a revision of the rule should squarely address this
22 problem.

23 The most objectionable aspect of the proposed
24 rule is the elimination of existing requirements that
25 only citations and orders that have been become final are

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1 to be used to identify mines with potential POV. Vulcan
2 understands MSHA's preference to base POV status on
3 citations and orders issued as opposed to final orders
4 because there can be a substantial delay in the final
5 determination of a citation or a challenge by an
6 operator. This delay hampers MSHA's ability to use POV
7 as a timely tool to address current problems.

8 However, it is essential to note that if
9 actions are to be based upon nonfinal orders, they may
10 not be punitive in nature without violating the
11 operator's due process rights. The 14th Amendment
12 prohibits the Federal Government from depriving citizens
13 of liberty or property without the due process of law.
14 This means that actions that are punitive cannot be taken
15 without appropriate access to review. But in seeking to
16 strengthen the justification to eliminate final orders,
17 MSHA cites statistical evidence that fewer than 1 percent
18 of citations are reversed based on 700,000 citations
19 issued from 2006 to 2010.

20 What MSHA does not provide, however, is the
21 percentage of contested citations that are vacated or
22 modified. The number of citations that are vacated or
23 modified as a percentage of the total number of
24 violations assessed has much less relevance to this
25 process than the number of those that are reversed or

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1 modified as a percentage of the number contested. MSHA
2 further neglects to take into account the number of
3 citations that are threatened and/or issued only to be
4 informally vacated or otherwise dismissed at the MSHA
5 field office level, which is a regular occurrence
6 throughout MSHA regions.

7 While there is substantial evidence that MSHA
8 is not always correct in their interpretation of
9 regulations, MSHA wishes to change the regulations in
10 such a way that does, in fact, assume that all citations
11 are correctly issued. The potential for mine operators
12 to be placed on a Pattern of Violations based on
13 citations that may be vacated or modified at a later date
14 should cause any reasonably prudent person to conclude
15 that this change to an existing regulation is unjustified
16 and unreasonable.

17 In summary, while Vulcan Materials Company
18 fully supports all efforts to improve the safety and
19 health of miners in this country, we feel that MSHA
20 already has the necessary tools at its disposal to
21 identify operators with a Pattern of Violations and to
22 address a pattern with appropriate enforcement action.
23 The proposed rule will only increase the potential for a
24 mine to be placed on a Pattern of Violations without
25 sufficient justification for doing so, rather than

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1 improving the safety and health of our miners.

2 Thank you for an opportunity to provide
3 comments on this proposed rule.

4 MODERATOR SILVEY: Thank you. I have a few --
5 one -- a few questions and then maybe a comment or two.

6 With respect to the use of the single source,
7 you mentioned in your comments, the single-source page.

8 Have you used the web tool?

9 MR. CHIDSEY: I have.

10 MODERATOR SILVEY: You have?

11 MR. CHIDSEY: I found it very useful, and I
12 think it's a good tool.

13 MODERATOR SILVEY: So -- and now with respect
14 to what we said in the Public Hearing Notice, as well as
15 what I stated in my opening statement -- and I stated
16 that MSHA had re -- refined it -- excuse me -- its
17 position and that, as you know now, we have specific
18 criteria in the form of a formula on the web site. And
19 that formula is then what becomes populated into one of
20 your mines if you -- if ya'll put in this identification
21 number.

22 But in the opening -- in the Public Hearing
23 Notice and the opening statement, we stated that before
24 we change that specific criteria and use that changed
25 criteria to review a mine for a Pattern of Violations,

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1 that we would make it available to the public for
2 comment. We would then review the comments, give a
3 certain period of time for comments, and we would make it
4 available on our web site. We would then, as I said,
5 give a certain amount of time for comment. We would --
6 we would then review the comments, and we would next put
7 on the web site our response to the comments. And if we
8 made any revisions to the specific criteria, we would put
9 the revised criteria on the web site. What -- what is
10 your reaction to that process?

11 MR. CHIDSEY: As stated earlier, I feel that
12 that specific criteria should be put into the proposal
13 itself.

14 MODERATOR SILVEY: And somewhere in your
15 testimony, you also stated that the -- when talking about
16 the deletion of the potential Pattern of Violations, that
17 mine operators should have the opportunity to get with
18 the District Manager and review any inaccuracies in the
19 data or something like that.

20 One of the things that we were seeking to do in
21 the proposal is that -- and, hopefully, the web tool
22 would allow operators to know if they were approaching a
23 Pattern of Violations. And they could come into the
24 Agency with a -- a safety and health program as a
25 mitigating circumstance. They could develop a

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1 comprehensive -- a safety and health program. And they
2 could come in to the District Manager with that safety
3 and health program aimed at whatever the conditions were
4 that would lead -- giving rise to the pattern. And the
5 District Manager would review that, and then they would -
6 - the operator would implement it, and hopefully -- in an
7 optimum situation, the conditions giving rise to the
8 pattern would be reduced through that, through that
9 safety and health program.

10 And, in fact, we are operating under that kind
11 of concept right now through corrective action plans.
12 The operators -- a number of operators have been
13 identified for a potential Pattern of Violations and have
14 subsequently submitted corrective action plans -- I guess
15 they're called "corrective action plans." And then
16 they've made tremendous improvements. I mean, Jay has
17 the specific numbers on that. But I think, generally
18 speaking, that process has worked.

19 MR. CHIDSEY: Maybe I misunderstood the
20 proposal. My understanding was that that potential POV
21 status and notification was going away.

22 MODERATOR SILVEY: The potential POV is going
23 away. But I am just suggesting to you that the proposal
24 does contain an opportunity for an operator to have a
25 remedial process. That's my only -- that's what I'm

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1 saying.

2 Under the mitigating circumstance provision,
3 that does -- that does contain the concept of the
4 operator having an opportunity to remediate himself or
5 herself. That's what I was suggesting. And I think
6 under the -- it's the same concept under the existing
7 process, and I think it's working now.

8 The only other comment I have is that you -- in
9 your -- on page 2 of your comment, you say: "MSHA
10 further neglects to take into account the number of
11 citations that are threatened and are issued only to be
12 informally vacated."

13 Can you explain to me exactly what you mean by
14 "threatened and are issued only to be informally vacated
15 or otherwise dismissed?" I mean, give me an example.

16 MR. CHIDSEY: Well, there's just a number of
17 times when an inspector makes the verbal comment that
18 he's going to write that as a citation. We -- you know,
19 we get involved and contact the Field Office Supervisor
20 or the District Manager and explain the situation and --
21 and the inspector has communications with that -- with
22 those folks and does not end up writing a citation.

23 MODERATOR SILVEY: Okay.

24 Actually, the citation is never written in that
25 situation, right?

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1 MR. CHIDSEY: That's correct. Sometimes they
2 are written and that same process occurs and it's vacated
3 without going through the formal process.

4 MODERATOR SILVEY: But I guess I was -- by
5 looking at this, I was sort of -- figured if you said
6 "threatened," that a citation was never issued in that
7 situation.

8 MR. CHIDSEY: Well, I think -- you know,
9 "threatened" is a -- is a proper term.

10 MODERATOR SILVEY: Well, it may be a proper
11 term. It may be factually what happened. I guess my --
12 the only point I'm making is that under that situation,
13 the citation would never be taken into consideration for
14 a pattern because the citation would never -- that's my
15 point.

16 MR. CHIDSEY: I understand your point.

17 MODERATOR SILVEY: Okay. Thank you. Okay.
18 Thank you.

19 MR. CHIDSEY: Thank you.

20 MODERATOR SILVEY: The next speaker is Rick
21 Steiskal. Yeah, I was going to say Hendrix. Excuse me.

22 But you have to spell your name for the -- with
23 the National Aggregates USA and the National Stone, Sand
24 and Gravel Association. Thank you.

25 MR. STEISKAL: Good afternoon, everybody. My

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1 name is Rick Steiskal. It's R-I-C-K, last name is S-T-E-
2 I-S-K-A-L.

3 Welcome to the Southeast. I hope it's hot
4 enough for you folks.

5 MODERATOR SILVEY: It's the same in Washington.

6 MR. STEISKAL: All right. Well, it's what we
7 deal with this time of the year.

8 MODERATOR SILVEY: Right.

9 MR. STEISKAL: I'd like to take a moment to
10 discuss the current Pattern of Violations program. I
11 have to give you some of my background so that you better
12 understand where my comments are coming from.

13 I'm an EH&S manager for Aggregates USA in the
14 Georgia division. I oversee the activities of three
15 quarries and approximately 140 employees. So we're not a
16 very large producer when it comes to nationwide. But
17 Aggregates USA won the Sterling Award in 2011 as the
18 NSSGA member with the lowest total incidence rate for the
19 previous calendar year in the large producer category.
20 We're very proud of that fact, and we take safety as a
21 top priority.

22 One of our quarries takes approximately seven
23 to ten days to complete for an inspection, when the
24 others take approximately two, if only a single inspector
25 shows up. So that lets you understand how long we do

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1 spend with an MSHA inspector at our quarries a couple of
2 times a year.

3 The current pattern criteria: (1) is 50 S&S
4 citations in a 12-month period; (2) 25 percent of issued
5 S&S citations are either high or reckless disregard;
6 (3) goes over elevated citations; and (4) its injury
7 severity rate is much greater than industry average.

8 Those criteria to me are unbelievable. One percent of
9 mines fell into the original POV criteria? Was it
10 designed to catch anyone? With those being used to catch
11 America's worst mining facilities, I can't comprehend
12 what they must have been like to work in.

13 First, I applaud the Agency for wanting to
14 amend this regulation, because, as I have stated, the
15 above criteria is absurd. However, I warn you with the
16 current proposal, I do not believe that this is the best
17 path forward.

18 I believe the greatest fault with the new
19 version of POV is the fact that operators have not been
20 provided with enough information about the criteria to
21 properly assess the new rule. As everyone involved
22 knows, the most important aspect of the POV program is
23 being able to understand whether a Pattern of Violation
24 even exists.

25 MSHA has asked operators to comment on a

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1 program that is not fully developed or, if it is, then
2 all the criteria have not been made available to the
3 public. I must admit that it is impractical, if not
4 impossible, for us to comment on such a vague proposal.
5 MSHA must act responsibly and repropose this rule and
6 include the criteria it proposes to use in determining --
7 to use in determining if the Pattern of Violation exists.

8 Once this is done, the affected parties will be
9 able to give much better criticism and analysis of how
10 this proposed rule may affect us. First, MSHA must
11 remove the provision in the proposed rule where POV
12 status would be based on issued citations rather than
13 final orders. Does the Department of Labor or Assistant
14 Secretary really believe that the intent of the Mine Act
15 should outweigh the intent of the Constitution?

16 Since this proposal removes the protections
17 guaranteed by due process, there's no guarantee that a
18 mine operator would not be unjustifiably -- would not
19 unjustifiably suffer from punitive sanctions for Pattern
20 of Violations status. Citations must be able to
21 withstand the critical review in either a hearing or
22 alternative measures deemed suitable by the Secretary
23 before they can be used fully against the operator.

24 According to MSHA's web page, approximately 25
25 percent of all citations written from January 2008 to

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1 December 2010 have been contested. I realize some of
2 these are probably frivolously contested. But
3 nonetheless, MSHA inspectors do make mistakes; computers
4 make mistakes; databases are fed bad data' and mistakes
5 have already been made in alerting an operator to
6 potential Pattern of Violations status. With these facts
7 at hand, how can MSHA propose to remove an operator's
8 only available safeguard in this area? If a mine is put
9 on POV status and it is not warranted, then the operator
10 may be irreparably damaged.

11 With many of today's mining companies being
12 public companies, potential damage increases
13 exponentially to those affected operators. If this
14 situation were to actually play out, MSHA being a
15 Government entity can slip out the back door while a
16 wronged company is trying to retain people, fix its
17 reputation and its stock price while it's being beat
18 about the head and neck by the press. MSHA needs to
19 explain how vacated citations and orders will affect
20 pattern of violation status. Operators have not -- MSHA
21 has not properly clarified in the proposal how it will
22 deal with the situation where issued citations and orders
23 that are part of the those that cause the POV status are
24 vacated while an operator is still under pattern of
25 violation status.

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1 There must be a procedure implemented that will
2 cause a review of the outstanding citations and orders
3 that are vacated by the Agency in settlement or
4 litigation, and they may remove the operator if they no
5 longer meet POV criteria.

6 As the proposed rule is currently written, it
7 is unclear, confusing, and allows the Agency too much
8 discretion in determining POV status. The only thing
9 consistent with MSHA is their inconsistency. It is this
10 inconsistency that makes this proposal based on citations
11 issued versus final orders a very dangerous proposal for
12 all mine operators.

13 The proposed rule is seven items that would be
14 taken into account for determining the criteria for POV.
15 The problem is that we've been asked to provide comments
16 on the proposed rule without being privy to the fully
17 developed criteria. I understand they will be numerical
18 when they are developed. The proposed rule also states
19 an eighth factor called "mitigating circumstances." This
20 deals with safety and health management programs.

21 MSHA has not made clear how it intends two
22 rule-makings to perverse, so it is difficult to
23 understand how this piece of the puzzle will be used
24 against operators -- will be used by or against
25 operators. Sorry about that.

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1 Under the same factor, MSHA also must define
2 "effective implementation." How would MSHA improve the
3 management program and how would this program affect
4 pattern of violation status?

5 Things that I need -- I believe must be
6 considered before POV can be changed: Inspectors. In my
7 very short time in the mining industry, I've run into
8 some gems. MSHA is hiring inspectors from all walks of
9 life, many with little to no practical mining experience.
10 I realize I am above-ground aggregates, so we probably do
11 not see the most qualified or educated inspectors. Those
12 are probably reserved for underground coal anyway. Many
13 of the inspectors that we see every six months have a
14 teaching degree, Coast Guard experience, or are an ex-
15 police officer. I understand that they are trained for
16 six weeks at the mine academy and also spent time in
17 training with another inspector before their AR card is
18 issued.

19 However, just a year ago, the Inspector General
20 found that 56 percent of journeymen inspectors had not
21 completed annual refresher training. I submit there is
22 too much at stake for operators to allow every sheet of
23 paper written by some of these inspectors to be treated
24 as if it were gospel. POV is based on issued S&S
25 citations. I've read that MSHA is working to change the

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1 definition of S&S because it is too narrow. How can MSHA
2 expect operators to provide substantial comments on a
3 proposed rule when the criteria provided is not only
4 vague, but the very tool you plan to use to assign POV
5 status to operators may be amended in the future? Does
6 MSHA's reasoning for citations issued versus final --
7 final orders stem from the Agency's repeated complaints
8 about backlog in cases? Is this the justification for
9 violating the due process for every citizen? Having
10 one's day in court is the foundation of the 4th and 15th
11 Amendments and a cornerstone to our freedom and greatness
12 as a country.

13 I thank you for your time, your consideration,
14 and your continued to work -- and your continued work to
15 keep America's mines the safest in the world.

16 MODERATOR SILVEY: Thank you. I have a few
17 comments.

18 First of all, let me start from the last thing
19 first. And I -- and I -- and maybe I'm not doing a very
20 good job. But the safety and health management program
21 that's referenced in this proposal has nothing to do with
22 the safety and health management system rulemaking on
23 which we had public meetings last year. The two -- and
24 maybe we need to think about coming up with a different
25 term now. But the two are totally unrelated.

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1 And some -- at one of the other hearings,
2 someone referred to it as a rulemaker and they referred
3 to it as a proposal. It hadn't even reached the proposed
4 rule stage, by the way, because all we did was have -- we
5 did what, in fact, the President is encouraging and what
6 the mining public says to us all the time, which is get
7 early public input into rulemaking before you first --
8 put the first pen to paper. And that's what we sought to
9 do with that safety and health management system
10 rulemaking. But that's a separate entity, as I said.
11 Don't relate it to this one. It's unrelated.

12 And, now, the more I -- I'm sitting here now
13 just thinking extemporaneously -- and you know what they
14 say, maybe that's not the best thing to do. I'm thinking
15 out loud. But we -- we may need to come up with a
16 different terminology for it.

17 Under the current pattern process, we use
18 "Corrective Action Plan." That's really all it's meant
19 to be. And it's a -- it would be a program developed by
20 the mine operator to address the specific items at that
21 mine that could lead to a Pattern of Violations, you
22 know, at a -- at an underground mine -- at an underground
23 coal mine; it might be ventilation issues or roof control
24 issues and nothing -- and nothing else. At a surface
25 aggregate mine, it might be haulage accidents or

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1 something else. So that's what that program was meant to
2 be.

3 You know, an operator could use the web tool,
4 could see that he was approaching a Pattern of Violations
5 -- he or she was approaching a Pattern of Violations. It
6 might be within a range of 10 percent; and if I get 10
7 percent more violations in either particular category,
8 then I'm going to be over the threshold for Pattern of
9 Violations and -- and come up with a program as to how I
10 could reduce these. That was -- that is the intent of
11 that.

12 Now, I want to go back to your comment now on
13 the specific criteria because, obviously, we've heard a
14 lot of comment on that. The specific criteria that we
15 are using today, that criteria on the web site, everybody
16 is -- when people say we have no -- we don't know what it
17 is; it's on the web site. I probably cannot recite all
18 of it to you right now, but it's so many S&S violations -
19 - is it percentage or a number?

20 MR. MATTOS: It's a rate of the industry
21 average.

22 MR. STEISKAL: Yeah, the current is 50 in a 12-
23 month period.

24 MODERATOR SILVEY: Okay. So, anyway, that
25 criteria are on the web site.

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1 As I advanced the proposal this morning, what I
2 did say to everybody is that before we -- if we were to
3 make any revisions to that criteria, which is up there
4 today, before we did that, we would make the -- the
5 revised specific criteria available to the public on our
6 web site, take comments from the public, and then if
7 we -- and put your -- put our response to your comments
8 on the web site. And if we were to revise that criteria,
9 we would post the revised criteria.

10 So, you know -- so in terms of listening to
11 people saying they don't know what it is, that's one
12 thing to say you don't know what it is. But it is up
13 there, the criteria. And it will be up on the web site,
14 so you will know what it is. Saying that now -- I will
15 say to you, saying that you want it into the proposal,
16 that's a different issue. And I understand that.

17 So I -- but I'm -- I'm just trying to make it
18 clear so that everybody understands where the proposal
19 is. And that's all -- I don't have any questions per se.
20 Those were comments.

21 MR. STEISKAL: So if I may --

22 MODERATOR SILVEY: Yes?

23 MR. STEISKAL: -- the criteria is currently
24 found under 104(3), I believe it is, where there's 4 and
25 then "or the hundred per 12 months or the" -- I don't

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1 know what the other -- injury severity measured greater
2 than, those six things are remaining the same, those six
3 criteria under the -- I think it was written in 1990.

4 MODERATOR SILVEY: Well, just go on.

5 MR. MATTOS: Those criteria actually were used
6 -- that set that is currently out there was used for the
7 first time in 2010, last year, last screening.

8 MR. STEISKAL: Okay.

9 MR. MATTOS: We had a slightly different set of
10 criteria that we used between 2007 and 2009. And
11 probably need to clarify, too, the -- in the proposal --
12 what we did in the Preamble here, note that Congress
13 provided the Secretary with broad discretion in
14 establishing pattern criteria, recognizing that MSHA may
15 need to modify the criteria as experience dictates.

16 And our intent in coming up with this -- the
17 proposal to, in effect, notice and comment on the
18 criteria whenever we think it needs to be -- those
19 criteria need to be revised with our web establishing a
20 methodology by which we could revise these things as the
21 things changed. All kinds of things can change.

22 They need to be -- the criteria will need to be
23 tweaked every now and then. If we have to go pull the
24 notice and comment and rulemaking every time we need to
25 make a minor modification to those criteria, we could

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1 have criteria that really are not working for us now, but
2 we're bound by regulation to use them every -- twice a
3 year, even though we know when we find out, if we find
4 out, a new modification. So that's just one point of
5 clarification.

6 One thing, too, I need to clarify -- and
7 this -- Mr. Chidsey, it came up in your testimony also.
8 We currently do use citations and orders issued that are
9 not final in the current screening criteria. We use a
10 combination of citations issued and those that are final.
11 Just a clarification.

12 I do have one question, and I made a note here
13 that we would need a procedure to address the citations
14 and orders that are issued, that are in contest, that you
15 contest.

16 MR. STEISKAL: Yes.

17 MR. MATTOS: Do you have any thoughts on what a
18 procedure like that might be to address that concern?

19 MR. STEISKAL: I think if a -- if it is
20 contested and it makes it past the District Manager, that
21 that citation should not be used against the operator
22 until ALJ has heard it. In the -- if the ALJ vacates, it
23 does not count towards the 50. If the District Manager
24 vacates it -- if it gets that far and he decides to pass
25 it on, then so be it.

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1 MR. MATTOS: Thank you.

2 One issue we have right now is that there's a
3 25 percent contest rate.

4 MR. STEISKAL: Approximately. I found that on
5 your web page.

6 (Off the record.)

7 (On the record.)

8 MODERATOR SILVEY: He was talking about -- you
9 were talking about if citations and orders were
10 contested, right?

11 MR. STEISKAL: Yeah. If an ALJ holds it up, I
12 think you should be able to count that. But, you know, I
13 mean, that can be wishy-washy also. I haven't had to go
14 past that yet on anything that I've contested.

15 You know, Aggregates USA's record is out there.
16 You can look us up. We contested six in the last two
17 years and won six. So it's usually very subjective and
18 stuff that I don't feel -- well, they agreed that it's
19 not a hazard to miners.

20 MR. MATTOS: Thank you.

21 MR. STEISKAL: Yes, sir.

22 MR. JONES: I had a question. You mentioned
23 that the specific numerical criteria was unbelievable.
24 Could you explain what you meant by that?

25 MR. STEISKAL: We're a small quarrying

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1 operation. I can't imagine one mine having -- and I
2 realize some of the coalmines, MSHA inspectors live and
3 sleep with those guys. 50 S&S citations, I'd be looking
4 for a job. My boss would be looking for a job. Our
5 quarry managers would be looking for a job. Our
6 experience is smaller quarries -- we have a couple that
7 make greater than three million tons a year. But 50 in -
8 - in one -- at one spot, you know -- that's not company -
9 - that's just shocking to me.

10 MODERATOR SILVEY: I understand. I'll just say
11 that obviously when MSHA has to develop anything, some
12 people have noted that, you know -- we have to do it and
13 particularly now when you look -- this morning's rule was
14 on underground coal mine. For this Pattern of
15 Violations, we've got to do our best.

16 And sometimes -- and that's what Mr. Mattos was
17 talking about when he went to the fact that sometimes the
18 criteria may need to be refined. For a Pattern of
19 Violations, it's -- you've got to develop something
20 that's going to be applicable to coal and metal/
21 nonmetal, surface and underground. And just like you
22 pointed out, small, big, you know, and all kinds of
23 conditions. And, and so I hear what you're saying.

24 MR. STEISKAL: You know, I disagree. You've
25 given Aggregates the opportunity to set up their own

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1 training. Give Aggregates the opportunity -- break it
2 out. Give us the opportunity to have our own rules. You
3 have the different severity, severity measurements for
4 above-ground coal, underground coal, all those other
5 things. You can have different criteria for each of the
6 different areas.

7 MODERATOR SILVEY: Well, clearly you could.
8 And I don't want to -- you know, I'm not going to debate
9 that here.

10 MR. STEISKAL: Yeah.

11 MODERATOR SILVEY: You could have different
12 criteria. But under this provision, we've got to also
13 look at what we thought the Congressional intent was.
14 And for the Pattern of Violation stated, we think that
15 Congress intended for us to develop a uniform rule.

16 And so, yet, all I'm suggesting to you is that
17 -- I hear your point, but this is what happens when you
18 do -- you try -- that's all I'm saying.

19 MR. STEISKAL: Yeah, I understand. You've got
20 to spread the peanut butter all the way to the edge of
21 the bread.

22 MODERATOR SILVEY: Anyway, thank you very much.

23 MR. STEISKAL: You have a good day.

24 MODERATOR SILVEY: Does anybody else wish to
25 -- wish to make comment?

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1 Okay, Mark. Come on, Mark.

2 MR. ESLINGER: You say that with disgust.

3 MODERATOR SILVEY: No, Mark. Please come on.

4 MR. ESLINGER: I'll try not to quote this time,
5 okay?

6 My name is Mark Eslinger. I'm the General
7 Safety Manager for Five Star Mining, Inc., and Black
8 Panther Mining, LLC. Mark -- M-A-R-K -- Eslinger -- E-S-
9 L-I-N-G-E-R -- stating that the specific pattern criteria
10 will be posted on MSHA's web site gives no indication of
11 what the criteria will be. The proposed section does
12 list the things that will be considered, but does not
13 give an indication of what the criteria will actually be.

14 Mine operators need to know what this criteria
15 will be that they will be judged against. And to say it
16 needs to be modified down the road or could be changed as
17 to rulemaking is open-ended and you're changing the rule
18 down the road. I think the mine operators deserve to
19 know exactly what the rule is, as far as Pattern of
20 Violations and know exactly and specifically what the
21 operator is being judged against.

22 I also believe that the citations and orders
23 used in determining whether a mine should be put on the
24 Pattern of Violations must be final. You talked about a
25 25 percent contest rate. When you're looking at POV, the

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1 big things that are considered are like D orders, D
2 citations, S&S citations. Well, obviously those are the
3 things that you're going to contest because, one, they're
4 high dollar and, second, they enter into the POV. It's
5 not the mine operators' fault right now that it's running
6 so far behind, backlogged.

7 Just yesterday, I worked on a 2007 docket, 2008
8 docket, and two 2009 dockets. Those are all out outside
9 the 15 months that's used for, you know, judging your
10 history.

11 MSHA in coal, at least, is taking away the
12 conferencing. Conferencing is being denied. You send in
13 a conference request and it's denied. They've taken that
14 right away. Conferencing was a very good tool. It gave
15 a chance for the mine operator to sit down with somebody
16 in MSHA who was not the inspector and go through the
17 violation that was cited and discuss the parameters. And
18 there's a lot of things to it. You're looking at
19 negligence. You're looking at the number of people
20 affected. You're looking at whether it's reasonably
21 likely, unlikely, highly likely. And you're looking at
22 the injury, whether it's fatal, permanently disabling,
23 lost workdays, and that kind of thing. That's been taken
24 away from us. You can't do that anymore.

25 So any time you get a citation that's S&S or a

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1 D, generally you're going to ask for a conference and be
2 denied. And you're going to get the assessment sheet and
3 you're going to check off on that sheet that, hey, we
4 want to contest those can go back in. So now you're
5 dealing with the lawyers, and the only ones in MSHA
6 giving settlement is the District Manager and the
7 Assistant District Manager. So it's bogging the system
8 down.

9 And if MSHA thinks that they're going to get
10 this thing caught up, I don't think this is going to
11 happen. Because right now, the inspectors coming out
12 that are being trained are assessing things at a much
13 higher level than they used to be. Moderate negligence
14 is like the default. Instead of being low, they default
15 moderate to high. They end up high negligence citations
16 now repeatedly.

17 When I was an inspector, high negligence was
18 reserved for situations where there was a need to say to
19 the operator, Look, this is a severe thing on the
20 negligence, and now it seems like you get high negligence
21 all the time. I wish we could talk about the number of
22 citations like this guy talked about there. If you've
23 got a large mine, 50 S&S shouldn't be, but it's not that
24 hard to get.

25 MODERATOR SILVEY: Right.

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1 MR. ESLINGER: But the conferencing taken away,
2 it slows up this whole thing.

3 And another thing was a good teaching tool.
4 When an inspector came in, the conferencing officer would
5 say to that person, Hey, justify the number of people.
6 Why is it ten, or why is it five people? How is it high
7 negligence? Well, you have in your notes to support
8 that.

9 When we go before a judge, how are you going to
10 support that? And, generally, the level would come down
11 to a more applicable level, and sometimes the
12 conferencing would raise it. And now that's been taken
13 away from us. So, to say we're just going to -- whatever
14 is issued, we're going to use, I think, is really unfair
15 to the operator.

16 Now, when I was still in District 8 in MSHA, we
17 had this new inspector that got his AR card and he went
18 charging out and used 20-something pieces of paper in 2
19 days, most of which were Ds. And then the final result,
20 none of the Ds held up, and most of the violations didn't
21 hold up. There's some that held up.

22 But here, if you would take a young guy that
23 goes out and does that to a relatively new mine, I mean,
24 he's put that operator in a hurt if you cannot, you know,
25 wait until this thing sorts through the system.

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1 So I think it's wrong that you're saying that
2 we're going to just use the one issued. I do like the
3 tool right now where you can go onto the web site. I've
4 used it. I don't think that it's appropriate. The
5 criteria that's being used, I mean, we have no input into
6 it. But at least you can go in there and determine where
7 you're at in a situation at this point in time.

8 And then I'd like to say something about the
9 determination of 104(e)(1) Pattern of Violations. If
10 you're a large coalmine, it's almost impossible to go
11 through a quarter without getting an S&S violation. It's
12 almost impossible. I've only seen it happen a couple of
13 times. And the only way you're going to get off is if
14 MSHA wants you to get off.

15 I mean, you're going to make an attempt and
16 they're going to push down the violations. Because right
17 now, there's some criteria out there that have been given
18 by headquarters and District Managers. When you're like
19 a 103(i)(5)(A) spot mine and you get a permissibility
20 violation, it's S&S. It takes the judgment out of the
21 hands of the inspector, but it makes an automatic S&S.
22 If you get a bare spot in a cable, it's S&S.

23 So, I mean, this issuing the higher paper has
24 been pushed up. You're getting more and more of these
25 automatic S&S's. It's really unfair to the operator, and

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1 it goes to the criteria you're not going to be able to go
2 before the LJ, you know.

3 And one thing I'll say about contesting the
4 citations. When you get outside that history, we've got
5 to the point where we're just working on dollars. We
6 don't care what you mark. Because if it doesn't affect
7 the history, you know, other than somebody someday down
8 the road, somebody said: well, you had so many Ds and you
9 had so many this and that, you know. We're just looking
10 at the dollars.

11 Because we get that group out in Denver that
12 will say, well, we'll agree to lower the paper, but we're
13 not going to lower the money or we will only lower the
14 money a little bit. And we're saying, hey, we don't care
15 what you do with the paper because it's outside the
16 history. Let's look at the -- let's look at the
17 assessment. And the assessment in itself is unfair. If
18 you look at the assessment criteria, it goes up
19 exponentially. I mean, it starts out a couple of dollars
20 for every point and it goes up \$3,000 for every point and
21 -- or more. And it's very arbitrary what the inspector
22 can select.

23 He can select -- he can make it highly likely,
24 and it bounces up the points considerably. So, see,
25 you've got to get in there and contest it. You have to

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1 be able to be afforded that opportunity to contest it.
2 And you shouldn't have to be hit with that Pattern of
3 Violations on those occasions that you haven't been able
4 to contest. That's the end of my comment.

5 MODERATOR SILVEY: I'd like to just say
6 something about you mentioned that we got rid of
7 conferencing.

8 Basically, I think that probably in some MSHA
9 districts, both coal and metal and nonmetal, they do do
10 some form of conferencing.

11 However, on a pilot basis, we did have -- and I
12 see now the gentlemen have left because they were then --
13 in the metal/nonmetal, we had a pilot that was in the
14 southeast district, which would have been -- which would
15 have effectively applied to Georgia, his mine. And two
16 coal districts, Districts 2 and 6. I think they were 2
17 and 6 where the pilots were. And we're doing an
18 evaluation of that right now to determine where we go
19 from those three pilots.

20 But what I found interesting -- now, you never
21 know people's motivation. But it seems to me from
22 looking at the -- from review of what I saw so far,
23 percentage wise, a lot of the operators didn't avail
24 themselves of the conference process during that period
25 of time. I think I must say that I think that the ones

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1 who did said that they found it, you know, helpful,
2 useful. But I don't think a lot did. But we are
3 evaluating that on a whole, full-scale basis to determine
4 where to proceed.

5 MR. ESLINGER: You know, I don't understand
6 this. We had a conference thing in place for 25 years or
7 more.

8 MODERATOR SILVEY: Yeah, I understand.

9 MR. ESLINGER: Why do we got to run a pilot
10 program to look at it to determine if it worked?

11 MODERATOR SILVEY: I'm saying --

12 MR. ESLINGER: It worked. And now that right
13 of conferencing has been taken away.

14 MODERATOR SILVEY: Yeah.

15 MR. ESLINGER: And, unfortunately, right now,
16 I'm fighting citations in 2007 and 2008, back when that
17 was still in effect. And the safety technicians in that
18 were not trained to take notes because the safety
19 director could go and sit down with the conferencing
20 officer and they could bring up points back and forth.

21 Now, you've got to do it like you're an MSHA
22 inspector and you're going to court. So now it's forced
23 the safety person to become like an MSHA inspector, and
24 he has to write out a series of notes of what's happened.

25 I mean, you -- you put us into a position of

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1 battling legally everything that's being done. And I
2 think it's detracting from the safety department. But I
3 really think in this POV, you have to go after the final
4 paper. And if you all can't get it done in a few months,
5 you know, that's MSHA's problem. That's not the
6 operator's problem.

7 You know, we're willing to sit down in the next
8 day or next week and conference these citations and --
9 and move on. And a lot of this contesting could be
10 overcome if you would give us a conference officer and
11 give us somebody reasonable with experience and go from
12 there.

13 MR. MATTOS: One point just to clarify, Mark,
14 on your commenting on violations that are in contest
15 being outside that 15-month window or history.

16 Actually, we use the final order day in the
17 15-month history, so it's anything that becomes final
18 within that 15 months regardless of when it was cited.
19 So it, it never gets outside the history window. Just
20 to --

21 MR. ESLINGER: Can you explain that? So if we
22 settle a D order, let's say, of 2007, okay. And let's
23 say it's -- we come to an agreement and the judge signs
24 off on it today.

25 Is that part of today's history then or what?

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1 MR. MATTOS: It will be in the history for the
2 next 15 months, for civil penalty assessment purposes,
3 yes.

4 MR. ESLINGER: So in other words, you're saying
5 that really on the S&S and D papers, we need to get that
6 moved down if we think it should be and not worry about
7 the dollar situation?

8 MR. MATTOS: Well, the -- for civil penalty
9 purposes -- well, it doesn't make any difference if it's
10 a -- the history if it's an S&S or an order. It's any
11 citation that's issued. That becomes final. So the
12 paper itself isn't -- unless it's vacated, it's going to
13 show up in history for that period of time.

14 MR. ESLINGER: So, so, right now, for POV, if
15 you get a D order today, it's going to sit in history for
16 the 15 months, and then come 2 years down the road, if we
17 settle it, it still becomes a D; and then it goes back in
18 the history, and it goes back through it again?

19 MR. MATTOS: It becomes -- in looking at final
20 orders under the current violations for Pattern of
21 Violations, we're looking at anything that became final -
22 - currently we're looking at a 12-month window.

23 The 15 months is for civil penalty assessment
24 purposes. For Pattern of Violations, we're looking at a
25 12-month period now. But for final orders, it's anything

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1 that became final within the 12-month review period
2 that -- whenever we did the POV, regardless of when it
3 was issued.

4 MR. ESLINGER: Okay. I know it's 15 months on
5 your repeated violations and all that kind of stuff.

6 MR. MATTOS: For civil --

7 MR. ESLINGER: And 12 is for field --

8 MR. MATTOS: Currently, it's 12. In the
9 previous iterations, it was two year, a two-year window.
10 The last review, we did a one-year window.

11 MR. ESLINGER: Okay.

12 MR. JONES: I just wanted to clarify the record
13 on a legal point.

14 You mentioned about termination of POV notice.
15 The Mine Act specifies in 104E that POV is terminated
16 when the mine goes through a complete inspection without
17 an S&S. And our regulations just restate the actual Mine
18 Act text on how a POV is terminated.

19 MR. ESLINGER: Yeah, but I just want to make a
20 point. In real -- you know, MSHA has been criticized for
21 not using this tool. The reason they didn't use this
22 tool was it was a death penalty for the mines.

23 And I can remember sitting in District
24 Manager's meetings where they talked about it saying this
25 is a death penalty. And that's one of the reasons that

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1 they did not like to use POV and they resisted sitting
2 down and going through POV calculations.

3 MODERATOR SILVEY: I -- we -- I understand.

4 MR. ESLINGER: You understand? Well, I mean,
5 he brought it up.

6 MODERATOR SILVEY: I understand. I understand.

7 Okay. All right. Thank you very much.

8 Does anybody else --

9 Mr. Wilson, Tom?

10 MR. WILSON: Thomas Wilson -- W-I-L-S-O-N --
11 UMWA International Health and Safety representative. I
12 rise in support of the UMWA International's previously
13 submitted comments, and I'd like to talk about a couple
14 of the points in there.

15 The UMWA agrees with eliminating initial
16 screening criteria that MSHA has used to provide an
17 operator with an advance written warning about a
18 operation being vulnerable to imposition of Pattern of
19 Violations procedures.

20 Operators should have an ongoing awareness
21 about their own health and safety practices and
22 experience and shortcomings in these regards. They
23 should know when problems with their health and safety
24 program require more resources and/or attention.

25 Accordingly, there should be no need for the Government

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1 to provide a specific advance warning about operation
2 substandard health and safety record and the heightened
3 enforcement attention that may follow.

4 We, thus, support eliminating what is now in
5 104.3, the provisions for determining when operations
6 meet a potential Pattern of Violation. By removing this,
7 this would also remove the whipping post that operators
8 implement when they formally receive the advance notice
9 on the miners.

10 I have very little experience around Pattern of
11 Violations, but every time an advanced letter has, has
12 been issued, all of a sudden, there's fear tactics that
13 go out to all the miners trying to pit the miners against
14 MSHA. And, again, I think operators should be on
15 continued notice to what may come if they don't provide
16 the health and safety.

17 Also, another critical change that would be
18 accomplished by this proposed rule concerns the removal
19 of the current limitations that MSHA only consider final
20 orders for purposes of POV. Under this proposal,
21 citations and orders will be considered for possible POV
22 enforcement during the review period after the citation
23 and orders are issued, but while any legal challenges
24 remain pending.

25 The problem with the current system that limits

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1 a POV analysis to only final orders is that it can take
2 years to resolve a contested citation. And by the time
3 such as a citation becomes final, the Health and Safety
4 Commission at the mine may bear no relationship to what
5 they are when they -- when the hazard was identified and
6 the citation first issued. Meanwhile, miners may be
7 exposed to extraordinary unhealthy and unsafe mining
8 conditions by a chronic and persistent violator of MSHA
9 regulations. This exposure to unsafe conditions must be
10 eliminated, and I believe this proposal does this. Thank
11 you.

12 MODERATOR SILVEY: Thank you. Thank you.

13 Thank you so much. Okay.

14 Does anybody else wish to make comment or
15 testimony?

16 Mr. Blankenship.

17 MR. BLANKENSHIP: James Blankenship -- B-L-A-N-
18 K-E-N-S-H-I-P -- UMWA Local 2245 President, Walter Energy
19 Number 4 mines here in Brookwood, Alabama.

20 I rise in support of the International comments
21 that were sent to the office earlier, and I just want to
22 make a few points about what I've heard today.

23 About the potential Pattern of Violation
24 notice, all that does is let them know that they'll
25 change it for a little while. It doesn't change it

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1 forever. They'll change their safety standards until
2 they get off of this, off the POV, and then it goes right
3 back to where it's at. Operators should know already
4 what their health and safety standards are. They
5 shouldn't need a letter from MSHA saying your potential
6 Pattern of Violations. They should know it already.

7 I know it as a worker what they are. They
8 should know it. I know for a fact that operators contest
9 citations that they know were written correctly just so
10 that it doesn't become final rule so it gets tied up in
11 the two- or three-year system and doesn't count against
12 them. I'm glad that's being taken away from them. I'm
13 glad you're closing that loophole. Some gentleman quoted
14 the Constitution. It's been a long time since I was in
15 school, but nowhere in our Constitution do I see that it
16 gave an operator the right to injure or kill employees.

17 So close the loophole, make it fair and protect
18 the workers in these operations. That's what MSHA's only
19 job is, is to protect the people who go underground,
20 whether they're salary, union, company, or whatever.

21 One other thing I want to bring up is having
22 criteria that is based on MSHA inspection hours helps
23 bring some fairness to the system. Union representative
24 mines generally have better health and safety records
25 based, for example, on the number of fatality accidents.

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1 Yet, they're often issued a disproportionately large
2 number of citations because of the Constitutional
3 provisions served to encourage miners to show inspectors
4 any and all violations. This helps us to find and
5 correct problems before accidents occur.

6 Also, a disproportional high number of
7 inspection hours are devoted to the large unionized
8 operations. It is important that such operations do not
9 get unfairly targeted for POV procedure just because
10 union miners and unionized operations may receive a
11 relatively large number of citations and orders when they
12 tend to be more attentive to their health and safety
13 practices. That's true.

14 At Walter's Walter Energy Number 4, every day
15 we've got one, two, three, four inspectors, every day. I
16 know living in Alabama that there are not the nonunion
17 operations like that. Working in West Virginia, I worked
18 in a union mine. I know that we got inspected a lot more
19 than the nonunion mines across the road from us. I know
20 that for a fact. No doubt about it. We got more
21 citations because there was more hours put into it.

22 Another problem is how injuries are reported to
23 MSHA. And it relies upon -- the company comparing the
24 health and safety records of various mines is unreliable.
25 Injury reports depends on operators' reports, but have

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1 long -- but we have long known that chronic
2 underreporting -- some employers maintain programs that
3 serve to reduce the reporting of injuries. Some simply
4 fail to report reportable accidents.

5 One recent and public example rose in
6 connection with the television show "Coal," which I
7 personally know a lot of those guys that work in the
8 coalmines. On Spike TV, its first episode, a miner was
9 injured and carried away by ambulance, obviously missing
10 some work. That subsequent employee in episodes
11 confirmed while the accident should have been a
12 reportable lost time accident, our review of the POV
13 monitoring for cobalt coal does not show any such
14 accidents were reported.

15 Underreporting is a frequent problem that
16 demonstrates the problem with relying on accident reports
17 to understand what an operation actually experiences and
18 measure for POV. We, we suggest that fatality rates
19 should generally be weighed more heavily than injury
20 reports.

21 And if you look, even your own report earlier
22 said nonunion mines, there's a lot more accidents, a lot
23 more fatalities. That should weigh a lot heavier than an
24 injury report.

25 In closing, I just want to say that I think

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1 you're on the right track. There's no reason for any
2 operator to be afraid of this, none whatsoever. You
3 shouldn't be afraid of a State Trooper going down the
4 Interstate, going down 59 here when you leave here if you
5 abide by the law. If you're doing 70, he won't stop you.
6 If you're doing 90, he'll stop you. Same way in mining.
7 We all know what the law is. We know what we've got to
8 do. All we've got to do is do it. We shouldn't fear
9 these inspectors, and this should never be a problem.

10 So simply what operators want is you not to do
11 this, but you let them do what they want to do. Don't do
12 that. Hold their feet to the fire. Make them do what's
13 right. And I appreciate it. Thank you.

14 MODERATOR SILVEY: Thank you.

15 Let me make just one -- with respect to your
16 statement that you know -- you said you know for a fact
17 that nonunion mines get inspected less frequently than
18 union mines.

19 Do you have data on that, or is it more what
20 you --

21 MR. BLANKENSHIP: What I've talked and seen to
22 people -- talked to people. I've got friends that work
23 at nonunion mines, and I talk to them a lot.

24 MODERATOR SILVEY: But you don't have any --
25 you don't have any empirical data?

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1 MR. BLANKENSHIP: Not any data, but I can --
2 you could probably find -- I could probably find it.

3 MODERATOR SILVEY: Well, if you do have
4 empirical data and can submit it to us, I would be
5 interested in that.

6 MR. BLANKENSHIP: All right. I'll do it.

7 Thank you.

8 MODERATOR SILVEY: Okay. Thank you.

9 MR. BLANKENSHIP: Appreciate it.

10 MODERATOR SILVEY: Okay.

11 Anybody else wishing to comment? If nobody
12 else wishes to make a presentation, then I again want to
13 say that the Mine Safety and Health Administration
14 appreciates your participation in this public hearing.

15 I want to thank everybody who made
16 presentations, and I want to thank those of you who
17 attended the hearing and may not have made a
18 presentation. As I stated in the hearing this morning,
19 that says to MSHA that you have an interest in this
20 rulemaking, and we appreciate that.

21 I want to again emphasize that all comments
22 must be received by June 30th, 2011. MSHA will take your
23 comments, concerns, and your specific alternatives into
24 consideration in developing a final rule.

25 And I encourage everybody to continue

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1 participating in this and any other MSHA rulemaking.

2 The hearing is now concluded.

3 Thank you very much.

4 (Whereupon, at 1:23 p.m., the hearing in the
5 above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

CASE TITLE: Patterns of Violations

HEARING DATE: June 9, 2011

LOCATION: Birmingham, Alabama

I hereby certify that the proceedings and evidence are contained fully and accurately on the audio and notes reported by me at the hearing in the above case before the Department of Labor, Mine Safety & Health Administration.

Date: June 9, 2011

ANTHONY & ASSOCIATES, INC.


LISA BAILEY
(Official Reporter)

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REQUEST TO SPEAK

Pattern of Violations

Hearing
Birmingham, Alabama

June 9, 2011

	Name	Organization	Contact Info.
1.	<u>Rick Steiskal</u>	<u>Aggregates USA</u>	<u>478 972 4916</u>
2.	<u>IRVAN CHIDSEY</u>	<u>VULCAN MATERIALS</u>	<u>205 298 3052</u>
3.	<u>Mark Eslinger</u>	<u>Black Panther</u>	
4.	<u>Tom Wilson</u>	<u>UMWA</u>	
5.	<u>James Blankenship</u>	<u>UMWA</u>	
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			

AB73-PH-3A

ATTENDEES

SIGN-IN SHEET

Pattern of Violations

Hearing
Birmingham, Alabama

June 9, 2011

	Name	Organization	Contact Info.
✓ 1.	Truman Chissey	Vulcan Materials	205 298 3052
2.	Gary Brown	Carolina Stalife	704 279 2166
3.	Shan Wilkerson	UMWA	205 465 2201
4.	Phillip Whitlow	UMWA	205 689-0042
✓ 5.	James B. Dugay	UMWA	205-242-3641
✓ 6.	Thomas J. Wilson	UMWA Foundations	
7.	Mary Edge	Walter J.W. Energy	481-6936
8.	Orville Gibson	UMWA	205 886-7302
9.	Rodney Brinkley	Cuff. Res.	492 20721
10.	Tim Starns	UMWA	205-489-6235
✓ 11.	Mal O. Essinger	Black Panther Mining	812-745-2920
✓ 12.	Rick Steiskal		
13.			

My name is Truman Chidsey and I am the Director of Corporate Safety Services for Vulcan Materials Company. I appreciate the opportunity to provide comments concerning the proposed rule on the Pattern of Violations.

Vulcan Materials, based in Birmingham, Alabama, is the nation's largest producer of construction aggregates, a major producer of other construction materials including asphalt and ready-mixed concrete and a leading producer of cement in Florida. Vulcan currently operates 255 MSHA-regulated facilities across the country.

Although Vulcan fully supports the position that mine operators who repeatedly violate mandatory safety and health standards should face appropriate sanctions, MSHA's proposed rule contains modifications to the existing regulations which we find objectionable.

MSHA has done a commendable job of creating a POV single source page on its website whereby an operator can view the current Potential POV (PPOV) criteria as well as view an evaluation of a mine's potential of being considered for a PPOV. However, Vulcan believes that the specific POV criteria to be used for selecting operators for POV should be detailed in the proposal itself. These criteria are not simply guidance, but are intended to be binding criteria that will determine whether mines are subject to substantially increased enforcement. It is essential that the criteria not be a moving target especially if operators are expected to monitor their own performance to avoid POV status.

Vulcan does not support the proposed rule in which the current provision allowing for Potential POV notification of a facility has been deleted. This notification allows an opportunity for remedial steps to be taken, as well as an opportunity for the operator to meet with a district manager to review the basis for a potential POV designation. If there are inaccuracies, irreparable harm can come to operators erroneously placed into a pattern when their operation's citation history doesn't warrant it.

As MSHA notes, Congress intended for the POV program to apply to "mine operators with a record of repeated S&S violations. . . who have not responded to the Agency's other enforcement efforts." Vulcan is concerned that the proposed rule does not adequately reflect the legislative intent that POV is intended for circumstances of repeated violations by unresponsive operators.

Rather, MSHA's criteria are based on multiple violations. Thus, under the current proposal, a facility can be placed into PPOV status as a result of a single inspection with multiple citations, or as a result of one or two inspections with few citations, followed by one with a large number of citations. However, a facility is not currently placed into full POV status unless it fails to improve its performance over a period of time. If there is to be no official PPOV status under the

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proposed rule, the problem is that it may be difficult, if not impossible, for a mine operator to determine if a facility is threatened with POV status. This is clearly not the Congressional intent for the POV tool, and a revision of the rule should squarely address this problem.

The most objectionable aspect of the proposed rule is the elimination of existing requirements that only citations and orders that have become final are to be used to identify mines with a potential POV. Vulcan understands MSHA's preference to base POV status on citations and orders issued, as opposed to final orders, because there can be a substantial delay in the final determination of a citation or order challenged by an operator. This delay hampers MSHA's ability to use POV as a timely tool to address current problems. However, it is essential to note that, if actions are to be based upon non-final orders, they may not be punitive in nature without violating the operator's due process rights. The Fourteenth Amendment prohibits the federal government from depriving citizens of liberty or property without due process of law, and this means that actions that are punitive cannot be taken without appropriate access to review.

In seeking to strengthen their justification to eliminate final orders, MSHA cites statistical evidence that "fewer than one percent of citations are reversed," based on 700,000 citations issued between 2006-2010. What MSHA does not provide, however, is the percentage of *contested* citations that are vacated or modified. The number of citations that are vacated or modified as a percentage of the total number of violations assessed has much less relevance to this process than the number of those that are reversed or modified as a percentage of the number contested. MSHA further neglects to take into account the number of citations that are threatened and/or issued, only to be informally vacated or otherwise dismissed at the MSHA Field Office level, which is a regular occurrence throughout MSHA's regions.

While there is substantial evidence that MSHA is not always correct in their interpretation of the regulations, MSHA wishes to change the regulations in such a way that does in fact assume that all citations are correctly issued. The potential for mine operators to be placed on a pattern of violations based on citations that may be vacated or modified at a later date should cause any reasonably prudent person to conclude that this change to the existing regulation is unjustified and unreasonable.

In summary, while Vulcan Materials Company fully supports all efforts to improve the safety and health of miners in this country, we feel that MSHA already has the necessary tools at its disposal to identify operators with a pattern of violations and to address the pattern with appropriate enforcement action. The proposed rule only increases the potential for a mine to be placed on a pattern of violations without sufficient justification for doing so, rather than improving the safety and health of our miners.

Thank you for this opportunity to provide comments on this proposed rule.

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
PATTERN OF VIOLATIONS)

Pages: 1 through 43
Place: Arlington, Virginia
Date: June 15, 2011

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AB73-PH-4

IN THE MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
PATTERN OF VIOLATIONS)

Arlington, Virginia

Wednesday
June 15, 2011

APPEARANCES

MSHA Panel: PATRICIA W. SILVEY, JAY MATTOS,
CHERIE HUTCHISON, ANTHONY JONES

Speakers:

JOSEPH CASPER
Vice President of Safety
National Stone, Sand & Gravel Association

LINDA RAISOVICH-PARSONS
United Mine Workers of America

JOSH NELSON
Campaign Manager
CREDO Action

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1 PROCEEDINGS

2 (9:30 a.m.)

3 MODERATOR SILVEY: Again, good morning.
4 My name is Patricia W. Silvey. I'm the Deputy
5 Assistant Secretary for Operations for the Mine Safety
6 and Health Administration. I will be the Moderator of
7 this public hearing on MSHA's Proposed Rule on Pattern of
8 Violations.

9 On behalf of Assistant Secretary of Labor for
10 Mine Safety and Health, Joseph A. Main, I would like to
11 welcome all of you here today.

12 I would like to introduce the members of the
13 MSHA panel. To my left, Jay Mattos, who is the Chair of
14 the Pattern of Violations Rulemaking Committee; to my
15 right, Cherie Hutchison, Regulatory Specialist in MSHA's
16 Standards Office; and to her right, Anthony Jones, who is
17 with the Department of Labor, Office of the Solicitor.
18 And I'd also like to introduce David Hershfield who is in
19 the audience, who assisted as economist on this project.

20 In response to requests from the public, MSHA
21 is holding public hearings on its Pattern of Violations
22 proposed rule. This is the fourth public hearing on this
23 proposal. The earlier hearings were in Denver, Colorado,
24 June 2nd; Charleston, West Virginia, June 7th;
25 Birmingham, Alabama, June 9th; and in response to a

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1 request from the public, MSHA will hold an additional
2 hearing in Hazard, Kentucky, on Tuesday, July 12th. We
3 will be putting a notice in the Federal Register
4 announcing the hearing.

5 The purpose of this hearing is to receive
6 information from the public that will help MSHA evaluate
7 the requirements in the proposal and produce a final rule
8 that will improve health and safety conditions at mines.

9 As most of you know, the hearing will be
10 conducted in an informal manner. Formal Rules of
11 Evidence will not apply.

12 The hearing panel may ask questions of the
13 speakers. Speakers may ask questions of the panel.
14 Speakers and other attendees may present information to
15 the court reporter for inclusion in the rulemaking
16 record.

17 MSHA will accept written comments and other
18 appropriate information for the record from any
19 interested party, including those not presenting oral
20 statements.

21 MSHA is proposing to revise the Agency's
22 existing regulation on Pattern of Violations, which
23 applies to all mines, coal, and metal and non-metal,
24 surface and underground. MSHA determined that the
25 existing Pattern of Violations regulation does not

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1 adequately achieve the intent of the Federal Mine Safety
2 and Health Act of 1977, or the Mine Act.

3 Congress included the Pattern of Violations
4 provision in the Mine Act so that operators would manage
5 safety and health conditions at mines and find and fix
6 the root causes of Significant and Substantial, or S&S,
7 violations to protect the safety and health of miners.

22 MSHA asked that commenters be specific in their
23 comments and submit detailed rationale and supporting
24 documentation for suggested alternatives.

25 The proposed rule included general criteria and

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1 provided that the specific criteria used in the review to
2 identify mines with a pattern of S&S violations would be
3 posted on MSHA's website.

4 In the Preamble to the proposal, MSHA requests
5 suggestions on how the Agency should obtain comments from
6 mine operators and miners during the development of and
7 periodic revision to the specific POV criteria.

8 MSHA also requests comments on the best methods
9 for notifying operators and the mining public of changes
10 to these specific criteria.

11 In the public hearing notice, MSHA clarified
12 its proposal and moved its position a little further and
13 stated that any change to the specific criteria would be
14 made available to the public for comment, via posting on
15 the Agency's website, before MSHA uses it to review a
16 mine for a Pattern of Violations.

17 MSHA further stated that it planned to review
18 and respond to comments, revise as appropriate the
19 specific criteria, and post the Agency's response and any
20 revised specific criteria on the Agency's website. MSHA
21 asked for comments on this proposed approach to obtaining
22 public input into revisions to the specific Pattern of
23 Violations criteria. And I know that most of you know,
24 at least some of you know, that we have received a lot of
25 comment on the original proposal and then on the Agency's

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1 proposed approach to the specific criteria that was
2 included in the public hearing notice.

3 MSHA also requested comments on the burden
4 that monitoring a mine's compliance record against the
5 proposed specific Pattern of Violations specific criteria
6 using the Agency's website would place on mine operators.
7 And as some of you know, I know you do, MSHA has
8 developed a web tool to make it easier for mine operators
9 to monitor their own compliance, and MSHA did that in the
10 interest of transparency and so that operators could --
11 you can take this web tool and an operator can put in his
12 or her mine ID number, and it populates the web tool and
13 shows an operator how an operator is with respect to the
14 specific criteria that's now posted on our website.

15 And from some of the other public hearings, I
16 did hear from members of the public that they found the
17 web tool very useful, and we can tell that it's being
18 used a lot. At some point, I asked you about how many?
19 Did you remember how many people had used it?

20 MR. MATTOS: It was about 800 a week.

21 MODERATOR SILVEY: Eight hundred a week. So
22 people are, and the operators are indeed using it; and as
23 I said, they did say they found it very useful.

24 Under the proposal, to be considered as a
25 mitigating circumstance, the proposed rule would provide

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1 that an operator may submit a written safety and health
2 management program to the District Manager for approval.
3 MSHA would review the program to determine whether the
4 program's parameters would result in meaningful,
5 measurable, and significant reductions in S&S violations.

6 At this point, MSHA would like to clarify that
7 the Agency did not intend that the safety and health
8 management programs referenced in the proposal be the
9 same as those referenced in the Agency's rulemaking on
10 comprehensive safety and health management programs, and
11 in effect, the rulemaking on which we had three public
12 meetings last fall. The comprehensive safety and health
13 management program rulemaking has not gotten to the
14 proposed rule stage.

15 Rather, what MSHA intended was MSHA would
16 consider a safety and health management program as a
17 mitigating circumstance under the Pattern of Violations
18 proposal when it (1) includes measurable benchmarks for
19 abating specific violations that could lead to a Pattern
20 of Violations at a specific mine, and (2) addresses the
21 hazardous conditions at that mine.

22 In effect, if an operator were monitoring using
23 the web tool to monitor his or her safety performance and
24 saw that they were approaching the statistics in the
25 Pattern of Violations specific criteria, they could

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1 create a safety and health program aimed at the types of
2 violations that they were seeing that would give rise to
3 the Pattern of Violations and come into MSHA with that
4 program before the operator would be placed on a Pattern
5 of Violations. They would come in with a program for
6 reducing S&S violations and the other types of criteria
7 that are included in the specific criteria that MSHA uses
8 to review a mine for a pattern.

9 And so far under the existing rule, mine
10 operators indeed who were notified of a potential Pattern
11 of Violations have come into the Agency with, under the
12 existing rule, a corrective action plan. That's the
13 terminology I think it's called, a corrective action, and
14 they have indeed made significant improvements in safety
15 and health violations and other parameters in the
16 criteria. They've made improvements at their mines.

17 MSHA requested detailed information and data on
18 the cost, benefits, and feasibility of implementing the
19 proposed provisions. MSHA requested specific comments on
20 its estimates of numbers of mines affected, which are
21 likely to vary from year-to-year.

22 As you address the proposed provisions, either
23 in your testimony today or in your written comments,
24 please be as specific as possible. We cannot
25 sufficiently evaluate general comments. You may submit

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1 comments following this public hearing. Comments must be
2 received or postmarked by August 1st, and comments may be
3 submitted by any method identified in the proposed rule.

4 MSHA will make available a verbatim transcript
5 of this public hearing approximately two weeks after the
6 completion of the hearing. You may view the transcripts
7 of all the public hearings on MSHA's website,
8 www.msha.gov and on www.regulations.gov.

9 We will now begin today's testimony. If you
10 have a hard copy of your presentation, please provide it
11 to the court reporter. Please begin by clearly stating
12 your name and organization and spelling your name for the
13 court reporter to make sure that we have an accurate
14 record.

15 Our first speaker today is Joseph Casper with
16 the National Stone, Sand & Gravel Association.

17 MR. CASPER: Good morning.

18 MODERATOR SILVEY: Good morning.

19 MR. CASPER: My name is Joseph Casper --
20 C-A-S-P-E-R, of the National Stone, Sand & Gravel
21 Association.

22 NSSGA very much appreciates this opportunity to
23 comment on the proposal on revising the Pattern of
24 Violations rule. We provide the following comments.

25 We believe -- and this is an application off of

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1 written comments that we submitted in April.

2 We believe that this program should be
3 carefully crafted so that it targets those operators that
4 repeatedly fail to live up to their obligations to
5 provide miners with a safe place to work.

6 NSSGA is concerned that there are several
7 significant gaps in the proposed rule. Currently, it's
8 impossible for commenters to thoroughly understand and
9 assess the proposal. Therefore, NSSGA requests that MSHA
10 re-propose the rule to address these gaps and allow
11 operators a fair opportunity to comment on the fully
12 proposed POV program as a whole.

13 Following is a summation of some of our key
14 concerns.

15 The POV criteria should be specified in the
16 rule. MSHA proposes to list its specific criteria for
17 POV status on the MSHA website but has not included
18 specific criteria for selection of operators. NSSGA
19 believes that the specific criteria to be used should be
20 detailed in the proposal.

21 Also, it is essential that the criteria not be
22 a moving target, especially if operators are expected to
23 monitor their own performance in order to avoid POV
24 status and have that be the only way for the operators to
25 know exactly where they stand with the Agency as far as

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1 POV action possibly is concerned.

2 Second, the POV criteria should be clear and
3 easy to access. NSSGA agrees with MSHA's data goal to
4 provide clear, transparent, and accessible POV criteria;
5 however, we were struck that the proposal deletes the
6 current provision in POV allowing for notification of
7 proposed POV status.

8 Third, POV status should only result from
9 repeated violations. As MSHA noted in the proposal,
10 Congress intended for the POV program to apply to mine
11 operators with a record of repeated S&S citations of
12 violations, who have not responded to the Agency's other
13 enforcement efforts. We're concerned that the proposed
14 rule does not adequately reflect the legislative intent
15 that POV is intended for circumstances of repeated
16 violations by unresponsive operators.

17 Rather, MSHA's screening criteria are based on
18 multiple violations. Thus, under the current proposal,
19 it's our understanding that a facility can be placed on
20 POV status as a result of a single inspection with
21 multiple citations, or as a result of one or two
22 inspections with POV citations followed by one inspection
23 with a high number of citations.

24 This is clearly not the Congressional intent
25 for the POV rule tool, and a revision of the rule should

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1 squarely address this problem.

2 Under the current rule and screening criteria,
3 a single inspection with multiple citations can place a
4 mine under status. However, a facility is not currently
5 placed under full POV status unless it fails to improve
6 its performance over time.

7 If there is no potential POV status under the
8 proposed rule, we see the problem as being that it may be
9 difficult, if not impossible, for an operator to
10 determine if it is threatened with POV status. It is
11 difficult to comment on exactly how the criteria should
12 reflect the need to address repeated violations, as
13 opposed to multiple violations, without knowing what
14 specific criteria MSHA proposes to apply.

15 Fourth, if POV status is not based on final
16 orders, punitive elements violate due process rights.
17 NSSGA understands MSHA's preference to base POV status on
18 citations and orders issued as opposed to final orders
19 because there can be a significant delay in the final
20 determination of a citation or order challenged by an
21 operator. This delay hampers MSHA's ability to use POV
22 as a timely tool.

23 However, it is essential to note that if
24 actions are to be based on non-final orders, they need
25 not be punitive in nature without violating the

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1 operator's due process rights. The Fourteenth Amendment
2 prohibits the Federal Government from depriving citizens
3 of liberty or property without due process of law, and
4 this means that actions that are punitive cannot be taken
5 without appropriate access to review.

6 This does not mean that MSHA can take no
7 actions prior to a final order. Certainly, it can take
8 actions designed to protect miners from harm, and it
9 certainly has the discretion to increase the level of
10 scrutiny of a mine operation with repeated citations or
11 orders.

12 Fifth, if POV status is based on citations
13 subsequently vacated, POV status must be terminated.

14 The proposed rule calls for terminating POV
15 status only if an inspection of the entire mine reveals
16 no S&S citations. However, because the proposal calls
17 for basing POV status on non-final orders, POV status
18 must also be terminated, it seems to us, if citations or
19 orders upon which the status is based are subsequently
20 reversed or reduced in severity.

21 Finally, remedial plans should not be confused
22 with comprehensive safety and health management system
23 programs. MSHA indicates in the Preamble that a mine
24 operator finding that a mine is at risk of POV status may
25 submit a written safety and health management program to

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1 MSHA for approval, and that such a program may serve as a
2 mitigating circumstance that may help the operator avoid
3 POV status.

4 NSSGA does not object to the concept of a mine
5 operator working with MSHA to develop a remedial plan to
6 address problems that could lead to POV. However, NSSGA
7 is concerned that the language in the Preamble may
8 suggest that MSHA will require comprehensive safety and
9 health management systems that go beyond the particular
10 concerns underlying the potential POV status.

11 We support safety and health management systems
12 used and have testified so last fall here at MSHA.
13 However, we don't believe that a safety and health
14 management system should be mandated for the entire
15 operation if the basis for POV status is much more
16 limited than being operation-wide.

17 In summation, the proposed rule stands, it
18 seems to us, as a positive effort toward developing a
19 program that will be transparent and effective in
20 allowing the Agency to go after operators that aren't
21 committed to safety and health and compliance. However,
22 we believe that more work needs to be done. MSHA should
23 re-propose the rule and include specific criteria that it
24 plans to use as a basis for determining which operations
25 are placed on a pattern.

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1 In particular, reasonable cost estimates cannot
2 be performed without an understanding of those specific
3 criteria. Also a determination of an operator's POV
4 status must be based solely on those citations that are
5 fully adjudicated.

6 This closes our comments, and we appreciate the
7 opportunity to provide to you our feedback.

8 MODERATOR SILVEY: Thank you. I have a few
9 comments and a few questions.

10 As you stated, the proposal should not be a
11 moving target. So I'd like to ask your response to the
12 approach that was proffered in the public hearing notice;
13 that is, that the specific criteria, as everybody knows,
14 the specific criteria that we use today to review a mine
15 for a Pattern of Violations is on the website. Then
16 subsequent to putting it on the website, we developed
17 this web tool whereby a mine operator could monitor his
18 or her performance against that specific criteria.

19 Now, in the public hearing notice, we said
20 before we change that criteria, that specific criteria,
21 assuming that a year from now we were going to review a
22 mine for a pattern, before we made a change to it, we
23 would post it on the website. We would take comments
24 from the public. We would then evaluate the comments and
25 respond to the comments, post our response; and if we

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1 revised that specific criteria in response to some of the
2 comments we got, then we would post the specific
3 criteria.

4 I mean, what's your response to that approach?
5 I guess I say that because at one point, you said they
6 should -- mine operators should know what the specific
7 criteria are, and we -- and it was with that in mind,
8 that we intended that operators, indeed, and the public
9 know what the specific criteria are.

10 MR. CASPER: Right.

11 MODERATOR SILVEY: But what is your response to
12 that approach?

13 MR. CASPER: We will develop a formal response
14 that I can provide you, and I can shortly after.

15 MODERATOR SILVEY: Okay.

16 MR. CASPER: That can be very helpful, and the
17 explanation is very helpful, and it's more clear to us
18 than it was when it was first put on the site.

19 MODERATOR SILVEY: Yeah.

20 MR. CASPER: So, thank you.

21 MODERATOR SILVEY: The other thing I want -- I
22 do want and I made some statement about it. I said at
23 one of the other public hearings a little bit jokingly,
24 but maybe not so jokingly, that we got to change the name
25 of this comprehensive safety and health management

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1 program because people are confusing it with safety and
2 health management systems, indeed, that rulemaking that
3 we started but we have not advanced beyond the
4 preliminary stages of that rulemaking as all of you know.

5 We took -- we had public meetings and took
6 input into the public before we even started to develop a
7 proposed rule, which is what many of you have told us for
8 so many years. So in any event, we -- the safety and
9 health management program provision, that would be a part
10 of a mitigating circumstance, where an operator could
11 come into MSHA as a mitigating circumstance, if the
12 operator felt like they were approaching a Pattern of
13 Violations, what they would do is develop a program aimed
14 at the specific conditions at the mine, the types of
15 violations -- I don't know, whatever they are, you know,
16 haulage violations or guarding violations or whatever
17 type, the types of violations at the mine giving rise to
18 the -- to leading to the pattern.

19 So we said that they could come in with a
20 program, whatever kind of program we want to call it,
21 corrective program, aimed at addressing those conditions.
22 So, you know, I want to sort of, kind of hope that people
23 see what we were talking about in doing that; and in many
24 ways, that could -- not in many ways. That does. That
25 provides a remedial approach. That provides an

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1 opportunity for the operator to remediate the conditions
2 at the mind.

3 MR. CASPER: Thank you. We appreciate that
4 kind of clarification, and to the extent that that kind
5 of program can be specific to the operation --

6 MODERATOR SILVEY: Right.

7 MR. CASPER: -- we think that would be very
8 helpful.

9 And to be candid, our concern on the safety and
10 health management system proposal, to the extent that we
11 had any basis for comment, was a fear that something
12 might come down in a one size fits all kind of approach,
13 the likes of which we think risks undercutting the cause
14 for managing effectively and successfully for safety and
15 health. So thank you for that clarification.

16 MODERATOR SILVEY: Yeah, those were two
17 different -- we didn't intend that, but we have gotten
18 comments. So, you know, obviously that was -- there may
19 have been some confusion.

20 MR. CASPER: Got you.

21 MODERATOR SILVEY: Right.

22 MR. CASPER: Thank you.

23 MODERATOR SILVEY: I don't have any others.

24 Do you have any?

25 MR. MATTOS: I just have one.

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1 MODERATOR SILVEY: Okay.

2 MR. MATTOS: Joe --

3 MR. CASPER: Yes.

4 MR. MATTOS: -- just -- I just want to make
5 sure I understand the distinction between repeat --
6 repeated violations and multiple violations.

7 MR. CASPER: Well, we saw it that you had to
8 have repeated violations of the same standard in the
9 traditional POV approach, and we thought that that ought
10 to be the basis for going forward, as opposed to not
11 having a focus just on repeated violations. Because then
12 it's a different kind of POV program than it was in the
13 past.

14 MR. MATTOS: Okay. I think -- I thought that's
15 where you --

16 MR. CASPER: Yeah.

17 MR. MATTOS: I just wanted to make sure.

18 MR. CASPER: Yeah.

19 MR. JONES: Have you or your members used the
20 POV web tool?

21 MR. CASPER: I have looked it. I don't know
22 that the members have.

23 MR. JONES: What is your opinion of the web
24 tool?

25 MR. CASPER: It looked helpful, but I'll tell

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1 you, I -- the basis of it -- the basis of the success is
2 going to be based in part on it having completely
3 accurate information and the database --

4 MODERATOR SILVEY: I think we heard from some
5 of your members who had used it.

6 MR. CASPER: -- having accurate information.

7 We've had challenges with that in the past in terms of
8 database control. So accuracy is critical, but the tool
9 itself -- and I sat at the run through -- was impressive
10 and it was smooth and user friendly.

11 It is a concern to us, however, that -- for an
12 operator to have to check that, I guess monthly according
13 to the proposal, still the claim of five minutes to do
14 that monthly is overly optimistic. I think given what an
15 operator has to juggle in terms of checking for POV
16 status, it would necessitate spending more than five
17 minutes time, not that the tool isn't friendly. It seems
18 to be a user-friendly tool and worked fine in the run
19 through, but that is a concern of ours.

20 MODERATOR SILVEY: Yeah, we did hear from
21 members who have used it.

22 MR. CASPER: Okay. Good.

23 MODERATOR SILVEY: Okay. Thank you very much.

24 MR. CASPER: Thank you.

25 MODERATOR SILVEY: Our next person will be

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1 Linda Raisovich-Parsons with the United Mine Workers.

2 MS. RAISOVICH-PARSONS: Good morning.

3 MODERATOR SILVEY: Good morning.

4 MS. RAISOVICH-PARSONS: My name is Linda
5 Raisovich-Parsons, and I'm here today on behalf of the
6 United Mine Workers of America. I appreciate the
7 opportunity to address the UMWA's thoughts on the
8 proposed rule for Pattern of Violations.

9 The UMWA generally supports the rule as
10 proposed by MSHA. However, we have certain concerns
11 about the proposal, which I will discuss today.

12 The Pattern of Violations enforcement tool has
13 been at Section 104(e) of the Mine Act since 1977; yet,
14 MSHA's use of this tool has been virtually nonexistent
15 until very recently. We encourage MSHA to maintain the
16 POV procedure that is easy for the mining community to
17 understand and for MSHA to enforce.

18 The recent online tool for monitoring whether a
19 mine meets the Pattern of Violations criteria is a step
20 in the right direction and will be a useful tool for the
21 mining community to monitor their mine's POV score. We
22 commend MSHA for this effort.

23 UMWA agrees with the elimination of the initial
24 screening process and the written notice of a potential
25 Pattern of Violations currently required under 104.3 of

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1 the Code. Mine operators should have an ongoing
2 awareness of their own health and safety practices and
3 history of the day-to-day operations of their mine. It's
4 not necessary for MSHA to forewarn them that they are in
5 trouble and could have a potential Pattern of Violations
6 forthcoming. Any mine operator should be fully aware of
7 shortcomings in their health and safety program and be
8 aware of the need for more resources and attention.

9 The new POV webpage criteria screening is a
10 sufficient tool to permit the mine operator to monitor
11 their own POV criteria history. Because the numbers on
12 this webpage are refreshed monthly, the industry can
13 access up-to-date statistics for their operations. So
14 there's no reason for the Government to provide an
15 advanced warning.

16 With the new POV webpage, mine operators will
17 be able to identify the specific areas where their
18 problems lie from the criteria red-flagged in their
19 stats. For this reason, the UMWA agrees with the
20 elimination of the written notice of a potential Pattern
21 of Violations, as proposed.

22 The UMWA also supports the Agency's removal of
23 the current limitation that MSHA only consider final
24 orders for purposes of a Pattern of Violations. The
25 problem with the current system that limits the Pattern

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1 of Violations analysis to only final orders is that it
2 could take years to resolve a contested citation. By the
3 time such citation becomes final, the conditions at the
4 mine may bear no resemblance to what they were when the
5 hazard was first cited. In the meantime, miners may have
6 been exposed to extraordinarily unsafe conditions by a
7 repeated violator, and the Agency is powerless to use
8 this enforcement tool until those challenged citations
9 become final.

10 The incentive for the operator to challenge all
11 S&S citations would be great in order to avoid a Pattern
12 of Violations. In 1989, when the rule was originally
13 proposed to only consider final orders, the Union raised
14 this concern. I personally testified in Denver,
15 Colorado, on November 8, 1989, predicting that if the
16 Agency limited themselves to final orders, that operators
17 would be encouraged to challenge all citations and orders
18 to simply avoid consideration for a Pattern of
19 Violations.

20 And now here we are, 22 years after I made that
21 prediction, with a major backlog of cases before the
22 Federal Mine Safety and Health Review Commission and the
23 first mine to be placed on a POV only recently. I must
24 have been psychic or perhaps just using common sense. If
25 there is a loophole to avoid a Pattern of Violations,

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1 rest assured the industry will take full advantage.

2 Some may argue that the operator's due process
3 would be compromised by allowing MSHA to consider non-
4 final citations and orders for POV determinations.

5 However, I care to differ. The plain language of the
6 Mine Act does not require MSHA to consider only final
7 citations and orders for it to use POV.

8 Secondly, the Mine Act includes many sections
9 that require an operator to immediately correct problems
10 MSHA identifies without exhausting challenge procedures.
11 Due process protections will still be available, just
12 later in time.

13 For example, a failure to abate an order under
14 Section 104(b) and an unwarrantable failure under Section
15 104(d) are issued on the basis of previous citations,
16 whether or not those citations have been challenged.

17 Likewise, an operator that disputes an
18 inspector's determination as to whether an imminent
19 danger exists, must immediately comply with the imminent
20 danger order and withdraw miners, though it still has the
21 right to challenge MSHA's issuance of the order.

22 The Senate Committee gave a fairly extensive
23 comparison between the unwarrantable and the POV
24 provisions in the legislative history of the Act. It
25 explained that the violation setting into motion for the

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1 unwarrantable failure sequence "must be of Significant
2 and Substantial nature and be the result of the
3 operator's unwarrantable failure to comply."

4 In comparison, it pointed out there is not a
5 requirement that the violations establishing the Pattern
6 of Violations be the result of the operator's
7 unwarrantable failure, only that they be of Significant
8 and Substantial nature.

9 The Senate Committee concluded its discussion
10 by pointing out that it is the Committee's intention that
11 the Secretary or his authorized representative may have
12 both enforcement tools available and that they be used
13 simultaneously if the situation warrants.

14 If an operator's challenge to the underlying
15 citations effectively blocks implementation of the POV,
16 the Secretary cannot use both enforcement tools
17 simultaneously as Congress intended.

18 Further, the Court is reviewing due process
19 issues to balance the private interest of the party,
20 claiming a deprivation of due process against both the
21 nature and importance of the Government's interest and
22 the risk of the Government making a mistake when
23 depriving due process and the consequences any such
24 mistake would entail.

25 When there is a compelling Government interest

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1 at stake, such as miner's health and safety, as the Mine
2 Act's first purpose states, the Court finds that an
3 after-the-fact hearing satisfies due process. The UMWA
4 believes that any due process concerns are adequately
5 protected by the Federal Mine Safety and Health Review
6 Commission and its judicial review procedures.

7 If the challenged citations are later reduced
8 to non-S&S or vacated, then it could be considered as
9 mitigating circumstances and the situation reevaluated.

10 Lastly, we recognize that the legislative
11 history granted the Secretary broad discretion in
12 establishing criteria for determining when a Pattern of
13 Violations exists. However, the UMWA believes that the
14 Agency has gained sufficient experience over the 30 years
15 since the Act first became law to now set the criteria
16 and still satisfy the discretion Congress reserved for
17 the Secretary.

18 We believe that absolute numbers should not
19 control for the criteria. For example, the record for
20 large mines should not be compared with the record of
21 small mines, or vice versa. The experience of mines
22 should be compared to those of comparable mines and
23 viewed according to comparable inspection hours when
24 evaluating their health and safety records.

25 The eight criteria listed in the proposed rule

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1 represent appropriate factors for MSHA to consider for
2 purposes of POV, but further explanation of how these
3 criteria will be considered or weighted should be
4 established at the outset. There must also be an Agency
5 commitment to apply the criteria in a consistent manner.
6 The Agency must also give consideration to circumstances,
7 which could create an unfairness in the health and safety
8 record for any given mine.

9 At union mines, a disproportionately higher
10 number of inspection hours are devoted to large unionized
11 operations. At the union mines, a miners' representative
12 routinely travels with a MSHA inspector and points out
13 any violations that they may see and consequently union
14 represented mines are issued a disproportionately larger
15 number of citations compared to their non-union
16 counterparts where miners are often intimidated and
17 discouraged from pointing out violations.

18 Further, the injury statistics are not a
19 reliable gauge of health and safety at a mine because we
20 have long known about chronic underreporting of accidents
21 at many mines. Our union mines make sure that all
22 accidents are reported and usually show a higher accident
23 rate than our non-union counterparts because of the
24 underreporting.

25 For this reason, we recommend that the fatality

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1 rates should be weighted more heavily than injury rates.
2 MSHA should also aggressively utilize its Part 50 audits
3 to determine whether operators are maintaining records
4 and reporting accidents and injuries as required. When
5 underreporting is found, these miners should be targeted
6 -- these mines should be targeted for closer scrutiny for
7 a POV.

8 Further, when any information suggests that an
9 operator is covering up violations in an effort to
10 mislead MSHA, they should be given special focus. The
11 impact inspections MSHA is currently conducting has
12 brought to light what goes on behind the scenes when it
13 is believed that MSHA is not looking. The flagrant
14 violations of the law MSHA found at some of these mines
15 should be considered to give these mines special focus
16 for a POV.

17 Evidence such as what has been revealed in the
18 Upper Big Branch explosion and investigation which
19 indicates that advance notice of MSHA inspectors were
20 routinely provided by non-security and further that
21 miners were intimidated and threatened if they made a
22 safety complaint, provides a clear picture of how these
23 mines are operated.

24 When such information comes to light, MSHA must
25 give special consideration for these operations to be put

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1 on a Pattern of Violations.

2 I appreciate the opportunity to testify today
3 and believe these regulatory changes are critically
4 important and necessary to restore to MSHA the powers
5 Congress intended it to have in Section 104(e) of the
6 Mine Act, but has been rendered ineffective by virtue of
7 restraints of existing regulations.

8 MODERATOR SILVEY: Thank you.

9 MS. RAISOVICH-PARSONS: Do you have any
10 questions?

11 MODERATOR SILVEY: Yeah, I just have one. With
12 respect to your specific -- your comment about the
13 criteria, you said the eight criteria are appropriate
14 factors but what was your comment? But did --

15 MS. RAISOVICH-PARSONS: Our concern is you're
16 given the flexibility to change that criteria; but as you
17 stated, when you answered the previous gentleman's
18 question, if that is, you know, if that's put out there
19 for the public to have some input into it, that's fine.

20 MODERATOR SILVEY: Okay.

21 MS. RAISOVICH-PARSONS: But, you know, for the
22 Secretary to just change the criteria, I don't think it's
23 fair to the mining community, and I don't think it's fair
24 to the operators or the miners, not to --

25 MODERATOR SILVEY: Okay.

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1 MS. RAISOVICH-PARSONS: -- have the opportunity
2 to have some input into that.

3 MODERATOR SILVEY: Okay. But if the specific
4 criteria is put out, like I said --

5 MS. RAISOVICH-PARSONS: Right.

6 MODERATOR SILVEY: -- posted on the website --

7 MS. RAISOVICH-PARSONS: Like the rulemaking.

8 MODERATOR SILVEY: -- we will take comment.

9 Okay. Okay. That's all I had.

10 Did you have anything?

11 MR. MATTOS: No.

12 MODERATOR SILVEY: Okay. Thank you.

13 The next speaker is Josh Nelson with CREDO.

14 MR. NELSON: Good morning.

15 MR. MATTOS: Good morning.

16 MODERATOR SILVEY: Good morning.

17 MR. NELSON: My name is Josh Nelson. That's
18 N-E-L-S-O-N. I'm a Campaign Manager with CREDO Action.

19 This proposal will change the way the Mine
20 Safety and Health Administration identifies mines that
21 demonstrate a pattern of serious violations.

22 The Agency would like to take citations that
23 are under appeal into account in such considerations
24 since appeals can take years to resolve. In the time
25 that an appealed citation remains unresolved, miners are

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1 subjected to dangerous working conditions that can result
2 in injury or death.

3 I wanted to take just a second to respond to
4 something that Mr. Casper said in previous testimony. He
5 indicated that this rule would make it difficult for
6 operators to know if they're in danger of reaching POV
7 status. There's a really simple solution to that.
8 Operators that follow all safety rules will not have this
9 problem. So it's a really simple way to solve that
10 problem.

11 Further, this information, as has been
12 mentioned, is readily available on MSHA's website within
13 the web tool.

14 Coal Association lobbyist, Chris Hamilton,
15 argued at a hearing last week that taking pending
16 citations into account violates fundamental principles of
17 fairness. I'd say the opposite is true. Coal miners
18 deserve every protection possible. Not taking viable
19 steps to reduce workplace injuries and deaths would
20 violate principles of fairness.

21 Taking all citations into account when
22 determining which mines are guilty of a Pattern of
23 Violations will reduce workplace injuries and save lives.
24 MSHA should move forward with this proposal immediately,
25 despite the objections of the coal industry.

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1 Here's the bottom line. No other industry or
2 profession in the world could get away with such a dismal
3 record of following the rules. If a doctor was caught
4 breaking the rules multiple times, and it caused patients
5 to die, she would lose her license to practice medicine.
6 If a lawyer disregarded the rules governing his
7 profession and violated them over and over again, he
8 would be disbarred and would no longer be allowed to
9 practice law. If anyone in this room got three or four
10 speeding tickets in a short period of time, putting the
11 lives of others at risk, we'd lose our driver's license
12 and no longer be allowed behind the wheel of a car.

13 Why should the coal industry be held to a
14 different standard? The only adequate answer to this
15 question is that it shouldn't. Mines that have
16 established a pattern of safety violations should be shut
17 down immediately and coal companies that own multiple
18 mines with poor safety records should no longer be
19 allowed to mine coal. This is how it works in other
20 industries, and it is far past the time that the American
21 coal industry enter the 21st Century and start looking
22 out for the welfare of its employees.

23 Thank you for your time.

24 MODERATOR SILVEY: Thank you.

25 Those are all the persons and organizations who

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1 have signed up.

2 Is there anybody else who wishes to comment?

3 Anybody else who wishes to comment?

4 If nobody else wishes to make a presentation,
5 then I, again, want to say that the Mine Safety and
6 Health Administration appreciates your participation at
7 this public hearing.

8 I want to thank everybody who made
9 presentations, and I want to also thank those who did not
10 make presentations but who attended the hearing because
11 that suggests to us that you have an interest in the
12 rulemaking, and we appreciate that.

13 I want to emphasize that all comments, as I
14 said earlier, now must be received or postmarked by a new
15 date of August 1, 2011.

16 MSHA will take your comments and your concerns
17 into consideration in developing the final rule; and as I
18 mentioned earlier, we will have another public hearing on
19 July 12th in Hazard, Kentucky. I encourage all of you to
20 continue to participate throughout this rulemaking
21 process and in all other MSHA rulemakings. Thank you.

22 The hearing is now concluded. Thank you very
23 much.

24 (Whereupon, at 10:15 a.m., the hearing in the
25 above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

CASE TITLE: Patterns of Violations

HEARING DATE: June 15, 2011

LOCATION: Arlington, Virginia

I hereby certify that the proceedings and evidence are contained fully and accurately on the audio and notes reported by me at the hearing in the above case before the Department of Labor, Mine Safety and Health Administration.

Date: June 15, 2011

ANTHONY & ASSOCIATES, INC.


TIMOTHY J. ATKINSON, JR. (ma)
(Official Reporter)

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REQUEST TO SPEAK

Pattern of Violations

Hearing
Arlington, Virginia

June 15, 2011

	Name	Organization	Contact Info.
1.	<u>Jeff Cooper</u>	<u>NSSGA</u>	<u>(703)526-1074</u>
2.	<u>Linda Raisovich-Parsons</u>	<u>VMWT</u>	<u>703-291-2424</u> <u>lparsons@vmwt.org</u>
3.	<u>Josh Nelson</u>	<u>CREDO</u>	<u>202-550-6175</u> <u>jnelson@credemobile.com</u>
4.	_____	_____	_____
5.	_____	_____	_____
6.	_____	_____	_____
7.	_____	_____	_____
8.	_____	_____	_____
9.	_____	_____	_____
10.	_____	_____	_____
11.	_____	_____	_____
12.	_____	_____	_____
13.	_____	_____	_____

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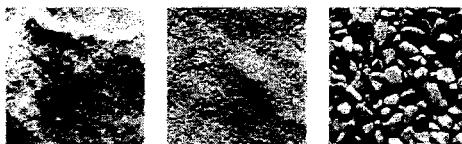
SIGN-IN SHEET

Pattern of Violations

Hearing
Arlington, Virginia

June 15, 2011

	Name	Organization	Contact Info.
1.	<u>Manuel Jimenes</u>	<u>Greenwine</u>	<u>202-491-5606</u>
2.	<u>Walter E. Tharp</u>	<u>Irving Materials, Inc.</u>	<u>(311) 432-9604</u>
3.	<u>Tina Starzewski</u>	<u>Law office of Adele Abrams</u>	<u>301 595 3520</u>
4.	<u>Jeffrey Cooper</u>	<u>NSGA</u>	<u>(103)526-1074</u>
5.	<u>Michael Neuman</u>	<u>Ogletree Deakins</u>	<u>202-887-0855</u>
6.	<u>Dinah Choi</u>	<u>Ogletree Deakins</u>	<u>"</u>
7.	<u>Gayle Cinquegrani</u>	<u>BNA</u>	<u>gcinquegrani@bna.com</u>
8.			
9.			
10.			
11.			
12.			
13.			



Natural building blocks for quality of life

April 15, 2011

U.S. Mine Safety and Health Administration
Office of Standards, Regulations and Variances
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

RE: Proposed Rule, Pattern of Violations, RIN 1219-AB73

Dear Madam or Sir:

NSSGA is the world's largest mining association by product volume. Its member companies represent more than 92 percent of the crushed stone and 75 percent of the sand and gravel (or aggregates) produced annually in the U.S. and approximately 118,000 working men and women in the aggregates industry. During 2010, a total of nearly 1.9 billion metric tons of aggregates, valued at \$17 billion, were produced and sold in the United States. The aggregates industry has demonstrated a steadfast commitment to worker safety and health, resulting in nine consecutive years of falling rates of injury and illness in the aggregates industry. This includes a continual decrease in number of fatalities amongst aggregates operator employees. Both are at historically low levels.

On behalf of the National Stone, Sand & Gravel Association (NSSGA), we provide the following comments on the proposed rule on Pattern of Violations (POV).

This program should be carefully crafted so that it targets those mine operators that repeatedly fail to live up to their obligations to provide miners with a safe place to work. Although the proposed rule takes several important steps toward this goal, there are a number of significant improvements that must be made before it is finalized.

NSSGA is concerned that there are significant gaps in the proposal. Currently, it is impossible for commenters to thoroughly understand and assess the proposal.

Therefore, NSSGA requests that MSHA re-propose the rule to address these gaps, and allow operators a fair opportunity to comment on the fully proposed POV program, as a whole. Also, this rulemaking should include public hearings. Following is the summation of primary areas of concern:

The POV Criteria Should Be Specified in the Rule

MSHA proposes to list its specific criteria for POV status on the Agency's website, but has not included specific criteria in the rule itself.

NSSGA believes that the specific POV criteria to be used for selecting operators for POV should be detailed in the proposal itself. These criteria are not simply guidance, but are intended to be binding criteria that will determine whether mines are subject to substantially increased enforcement. It is essential that the criteria not be a moving target especially if operators are expected to monitor their own performance to avoid POV status.

NSSGA notes that MSHA asks for comments on its projections of the number of mines likely to be subject to POV status under the new rule, and what the projected costs to the mining industry might be. It is impossible to make such estimates without knowing what the specific POV selection criteria will be.

The POV Criteria Should Be Clear and Easy to Access

NSSGA agrees with MSHA's stated goal to provide clear, transparent, and accessible POV criteria. Each mine should be able to immediately determine its potential POV status by viewing publicly available information on MSHA's website. We recommend that this information be collected in a single location, and that mine operators (and other interested parties) be able to view all of the relevant information at once by entering the mine ID number.

This will necessitate the creation of a computer program that can properly and accurately compile and display this information. We strongly urge MSHA to pilot any such program with the assistance of mine operators and other stakeholders, in order to ensure that the information and calculations it provides are accurate, timely, and usable. MSHA should also review the data quality control measures it uses for its data retrieval system, to ensure that the data provided are of sufficient accuracy and timeliness to allow mine operators and others to depend on the results. These data can have significant consequences for operators, and thus accuracy is essential. (We note that the necessity for accurate information also makes it unlikely that monitoring of this information will take only five minutes, because operators will likely review their own records and other MSHA data to verify it, especially if it suggests that POV status is imminent.) If there is inaccuracy, irreparable harm can come to operators erroneously placed onto pattern when their operation's citation history doesn't warrant it.

Further, we are struck that the proposal deletes the current provision allowing for "proposed" POV notification of a facility allowing for remedial steps to be taken, as well as an opportunity for the operator to meet with a district manager to review the basis for a proposed POV designation.

POV Status Should Only Result from Repeated Violations

As MSHA notes, Congress intended for the POV program to apply to "mine operators with a record of repeated S&S violations" "who have not responded to the Agency's other enforcement efforts." We are concerned that the proposed rule does not adequately reflect the legislative intent that POV is intended for circumstances of repeated violations by unresponsive operators.

Rather, MSHA's criteria are based on multiple violations. Thus, under the current proposal, a facility can be placed into PPOV status as a result of a single inspection with multiple citations, or as a result of one or two inspections with few citations, followed by one with a large number

of citations. This is clearly not the Congressional intent for the POV tool, and a revision of the rule should squarely address this problem.

Under the current rule and criteria, a single inspection with multiple citations and orders can place a mine into PPOV status. However, a facility is not currently placed into full POV status unless it fails to improve its performance over a period of time. While this still does not necessarily capture mines that are repeated violators, it at least means that POV status is based on a series of inspections.

If there is to be no official PPOV status under the proposed rule, the problem is that it may be difficult, if not impossible, for a mine to determine if it is threatened with POV status. The preamble discussion imagines that a facility will be able to tell if it is close to POV status by reviewing MSHA's data. But how close is close? If POV status can be triggered by a single inspection, then no mine operator can feel confident that it is not threatened with POV status.

It is difficult to comment on exactly how the criteria should reflect the need to address repeated violations, as opposed to multiple violations, without knowing what criteria MSHA proposes to apply.

If POV Status Is Not Based on Final Orders, Punitive Elements Violate Due Process Rights

NSSGA understands MSHA's preference to base POV status on citations and orders issued, as opposed to final orders, because there can be a substantial delay in the final determination of a citation or order challenged by an operator. This delay hampers MSHA's ability to use POV as a timely tool to address current problems.

However, it is essential to note that, if actions are to be based upon non-final orders, they may not be punitive in nature without violating the operator's due process rights. The Fourteenth Amendment prohibits the federal government from depriving citizens of liberty or property without due process of law – and this means that actions that are punitive cannot be taken without appropriate access to review.

This does not mean that MSHA can take no actions prior to a final order. Certainly it can take actions designed to protect miners from harm, and it certainly has the discretion to increase its level of scrutiny of a mine with repeated citations or orders. Such measures are not punitive.

If POV Status is Based on Citations Subsequently Vacated, POV Status Must Be Terminated

The proposed rule calls for terminating POV status only if an inspection of the entire mine reveals no S&S violations. However, because the proposal calls for basing POV status on non-final orders, POV status must also be terminated if citations or orders upon which the status is based are subsequently reversed, or reduced in severity.

Remedial Plans Should Not Be Confused with Comprehensive Safety and Health Management Programs

MSHA indicates in the preamble that a mine operator finding that a mine is at risk of POV status may submit a "written safety and health management program" to MSHA for approval, and that such a program may serve as a mitigating circumstance that may avoid POV status. NSSGA does not object to the concept of a mine operator working with MSHA to develop a remedial plan to address problems that could lead to POV. However, NSSGA is concerned that the language in the preamble may suggest that MSHA will require comprehensive safety and health management programs that go beyond the particular concerns that underlie the potential for POV status.

The proposed rule stands as a positive effort toward developing a program that will be transparent and effective. However, more work needs to be done. MSHA should re-propose the rule and include the criteria that it plans to use, to allow operators and other stakeholders to comment on the proposed program as a whole. In particular, reasonable cost estimates cannot be performed without an understanding of the POV criteria that will actually be imposed. Also, determination of an operator's POV status must be based solely on those citations that are fully adjudicated. Also, we believe that this rulemaking should include public hearings.

Thank you for this opportunity to comment. If you have any questions, please feel free to contact me at (703) 526-1074.

Sincerely,



Joseph Casper
VP, Safety

Testimony of Linda Raisovich-Parsons
Representing the United Mine Workers of America
on the Proposed Rule for
Pattern of Violations
Arlington, VA
June 15, 2011

Good Morning/Afternoon. My name is Linda Raisovich-Parsons and I am here today on behalf of the United Mine Workers of America. I appreciate the opportunity to address the UMWA's thoughts on the Proposed Rule for Pattern of Violations. The UMWA generally supports the rule as proposed by MSHA, however we have certain concerns about the proposal which I will discuss today. The Pattern of Violations enforcement tool has been in Section 104(e) of the Mine Act since 1977, yet MSHA's use of this tool has been virtually nonexistent until very recently. We encourage MSHA to maintain a POV procedure that is easy for the mining community to understand and for MSHA to enforce. The recent online tool for monitoring whether a mine meets the Pattern of Violation Criteria is a step in the right direction and will be a useful tool for the mining community to monitor their mine's POV score. We commend MSHA for this effort.

The UMWA agrees with elimination of the initial screening process and the written notice of a potential pattern of violations currently required under 104.3 of the code. Mine operators should have an ongoing awareness of their own health and safety practices and history of the day to day operation of their mine. It is not necessary for MSHA to forewarn them that they are in trouble and could have a potential pattern of violations forthcoming. Any mine operator should be fully aware of shortcomings in their health and safety program and be aware of the need for more resources and attention. The new POV web page criteria screening is a sufficient tool to permit the mine operator to monitor their own POV criteria history. Because the numbers on this web page are refreshed monthly, the industry can access up-to-date statistics for their operations, so there is no reason for the government to provide an advance warning. With the new POV web page, mine operators will be able to identify the specific areas where their problems lie through the criteria red flagged in their stats. For these reasons, the UMWA agrees with elimination of the written notice of a potential pattern of violations as proposed.

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The UMWA also supports the Agency's removal of the current limitation that MSHA only consider "final" orders for purposes of a pattern of violations. The problem with the current system that limits a pattern of violations analysis to only final orders is that it can take years to resolve a contested citation. By the time such a citation becomes final, the conditions at the mine may bear no resemblance to what they were when the hazard was first cited. In the meantime, miners may be exposed to extraordinarily unsafe conditions by a repeated violator and the Agency is powerless to use this enforcement tool until those challenged citations become final. The incentive for the operator to challenge all S&S citations would be great in order to avoid a pattern of violations. In 1989 when the rule was originally proposed to only consider final orders the Union raised this concern. I personally testified in Denver, CO on November 8, 1989 predicting that if the Agency limited themselves to final orders, operators would be encouraged to challenge all citations and orders to simply avoid consideration for a pattern of violations. And now here we are twenty-two years after I made that prediction with a major backlog of cases before the Federal Mine Safety and Health Review Commission and the first mine to be placed on a POV only recently. I must have been psychic or perhaps just using common sense. If there is a loophole to avoid a pattern of violations, rest assured the industry will take full advantage.

Some may argue that the operators' due process would be compromised by allowing MSHA to consider non-final citations and orders for POV determinations. However, I care to differ. The plain language of the Mine Act does not require MSHA to consider only final citations and orders for it to use POV. Secondly, the Mine Act includes many sections that require an operator to immediately correct problems MSHA identifies without exhausting challenge procedures. Due process protections will still be available, just later in time. For example, a failure to abate order under Sec. 104(b) and an unwarrantable failure order under Sec. 104 (d) are issued on the basis of previous citations, whether or not those citations have been challenged. Likewise, an operator that disputes an inspector's determination as to whether an imminent danger exists must immediately comply with the imminent danger order and withdraw miners, though it still has the right to challenge MSHA's issuance of the order.

The Senate Committee gave a fairly extensive comparison between the "unwarrantable" and the POV provisions in the Legislative History of the Act. It explained that the violation

setting into motion the unwarranted failure sequence “must be of a significant and substantial nature and must be the result of the operator’s ‘unwarranted failure’ to comply.” In comparison, it pointed out “there is not requirement that the violations establishing the pattern offense be a result of the operator’s ‘unwarranted failure’ only that they be of a ‘significant and substantial’ nature.” The Senate Committee concluded its discussion by pointing out that “it is the Committee’s intention that the Secretary or his authorized representative may have both enforcement tools available and that they can be used simultaneously if the situation warrants.” If an operator’s challenge to the underlying citations effectively blocks implementation of the POV, the Secretary cannot use both enforcement tools simultaneously as Congress intended.

Further, the courts reviewing due process issues balance the private interest of the party claiming a deprivation of due process against both the nature and importance of the government’s interest and the risk of the government making a mistake when depriving due process and the consequences any such mistake would entail. When there is a compelling government interest at stake such as miners’ health and safety as the Mine Act’s first purpose unequivocally states, the courts find that an after-the-fact hearing satisfies due process. The UMWA believes that any due process concerns are adequately protected by the Federal Mine Safety and Health Review Commission and its judicial review procedures. If the challenged citations are later reduced to non S&S or vacated, then it could be considered as mitigating circumstances and the situation re-evaluated.

Lastly, we recognize that the legislative history granted the Secretary “broad discretion in establishing criteria for determining when a pattern of violations exists”, however the UMWA believes that the Agency has gained sufficient experience over the 30 years since the Act first became law to now set criteria and still satisfy the discretion Congress reserved for the Secretary. We believe that absolute numbers should not control for the criteria. For example, the record for large mines should not be compared with the records of small mines or vice versa. The experiences of mines should be compared to those of comparable mines, and viewed according to comparable inspection hours when evaluating their health and safety record. The eight criteria listed in the proposed rule represent appropriate factors for MSHA to consider for purposes of POV but further explanation of how these criteria will be considered or weighted should be

established at the outset. There must also be an Agency commitment to apply the criteria in a consistent manner.

The Agency must also give consideration to circumstances which could create an unfairness in the health and safety record for any given mine. At union mines, a disproportionately high number of inspection hours are devoted to the large, unionized operations. At the union mines, miners' representatives routinely travel with the MSHA inspector and point out any violation that they may see and consequently union-represented mines are issued a disproportionately large number of citations compared to their non-union counterpart where miners are often intimidated and discouraged from pointing out violations. Further, the injury statistics are not a reliable gauge of health and safety at a mine because we have long known about chronic under reporting of accidents at many mines. Our union mines make sure that all accidents are reported and usually show a higher accident rate than our non-union counterparts because of the under reporting there. For this reason, we recommend that fatality rates should be weighted more heavily than injury rates. MSHA should also aggressively utilize its Part 50 audits to determine whether operators are maintaining records and reporting accidents and injuries as required. When under reporting is found, these mines should be targeted for closer scrutiny for a POV. Further when any information suggests that an operator is covering up violations in an effort to mislead MSHA, they should be given special focus. The impact inspections MSHA is currently conducting has brought to light what goes on behind the scenes when it is believed that MSHA is not looking. The flagrant violations of the law MSHA found at some of these mines should also be considered to give these mines special focus for a POV. Evidence such as what has been revealed in the Upper Big Branch Explosion investigation which indicates that advance notice of MSHA inspections were routinely provided by mine security and further that miners were intimidated and threatened if they made a safety complaint provides a clear picture of how these mines are operated. When such information comes to light, MSHA must give special consideration for these operations to be put on a Pattern of Violations.

I appreciate the opportunity to testify today and believe this regulatory change is critically important and necessary to restore to MSHA the powers Congress intended it to have in Section 104(e) of the Mine Act, but has been rendered ineffective by virtue of the restraints of existing regulations.

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
PATTERN OF VIOLATIONS)

Pages: 1 through 52

Place: Hazard, Kentucky

Date: July 12, 2011

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IN THE MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
PATTERN OF VIOLATIONS)

Hazard, Kentucky

Tuesday
July 12, 2011

APPEARANCES

MSHA Panel: PATRICIA W. SILVEY, JAY MATTOS

Speakers:

WES ADDINGTON, Appalachian Citizens Law Center
TONY OPPEGARD, Attorney, Lexington, Kentucky
BILL BISSETT, President, Kentucky Coal Association

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1 PROCEEDINGS

2 (10:00 a.m.)

3 MODERATOR SILVEY: Again, good morning. My
4 name is Patricia W. Silvey. I'm the Deputy Assistant
5 Secretary for Operations for the Mine Safety and Health
6 Administration, and I will be the moderator of this
7 public hearing on MSHA's Proposed Rule on Pattern of
8 Violations.

9 On behalf of Assistant Secretary of Labor for
10 Mine Safety and Health, Joseph A. Main, I would like to
11 welcome all of you here today. I'd like to introduce the
12 other member of my panel, who is Jay Mattos, and he is
13 Chair of the Pattern of Violations Rulemaking Committee.

14 In response to requests from the public, MSHA
15 is holding public hearings on its Pattern of Violations
16 Proposed Rule. This is the fifth hearing on the
17 proposal; and, as you know, these hearings are being held
18 in tandem with the hearing on the Proposed Rule on
19 Examinations. The other hearings were in Denver,
20 Colorado; in Charleston, West Virginia; in Birmingham,
21 Alabama, and at our headquarters in Arlington, Virginia.

22 Transcripts of the hearings are posted on
23 MSHA's website.

24 The purpose of this hearing is to receive
25 information from the public that will help MSHA evaluate

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1 the requirements in the proposal and produce a final rule
2 that will improve health and safety conditions at mines.

3 As most of you know, the hearings will be
4 conducted in an informal manner. Formal Rules of
5 Evidence will not apply.

6 The hearing panel may ask questions of the
7 speakers and the speakers may ask questions of the panel.
8 Speakers and other attendees may present information to
9 the court reporter for inclusion in the rulemaking
10 record.

11 MSHA will accept written comments and other
12 information for the record from any interested party,
13 including those not presenting oral statements. We ask
14 that everyone sign the attendance sheet.

15 MSHA is proposing to revise the Agency's
16 existing regulation on Pattern of Violations, and it
17 applies, as you know, to all mines, coal and metal and
18 nonmetal mines, surface and underground. MSHA determined
19 that the existing Pattern of Violations regulation does
20 not adequately achieve the intent of the Federal Mine
21 Safety and Health Act of 1977, or the Mine Act.

22 Congress included the Pattern of Violations
23 provision in the Mine Act, so that operators would manage
24 safety and health conditions at mines and find and fix
25 the root causes of Significant and Substantial, or S&S,

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1 violations to protect the safety and health of miners.

2 Congress intended that MSHA use the Pattern
3 of Violations provision to address operators who have
4 demonstrated a disregard for the safety and health of
5 miners. MSHA intended that the proposal would simplify
6 the existing Pattern of Violations criteria, improve
7 consistency in applying the Pattern of Violations
8 criteria, and more adequately achieve the statutory
9 intent.

10 The proposal would also encourage chronic
11 violators to comply with the Mine Act and MSHA's safety
12 and health standards. MSHA requested comments from the
13 mining community on all aspects of the Proposed Rule and
14 is particularly interested in comments that address
15 alternatives to key provisions in the proposal.

16 MSHA asks that commenters be specific in
17 their comments and submit detailed rationale and
18 supporting documentation for any suggested alternative.
19 The Proposed Rule included general criteria and provided
20 that the specific criteria used in MSHA's review to
21 identify mines with a pattern of S&S violations would be
22 posted on the Agency's website.

23 In the Preamble to the proposal, MSHA
24 requested suggestions on how the Agency should obtain
25 comments from mine operators and miners during the

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1 development of and periodic revision to the specific POV
2 criteria.

3 MSHA also requested comments on the best
4 methods for notifying mine operators and the mining
5 public of changes to these specific criteria. In the
6 public Hearing Notice, MSHA refined its position and
7 clarified its proposal and stated that any change to the
8 specific criteria would be available to the public for
9 comments, via posting on the Agency's website, before
10 MSHA uses it, to review a mine for a Pattern of
11 Violations.

12 MSHA plans to review and respond to the
13 comments, revise as appropriate, the specific criteria
14 and post the Agency's response and any revised specific
15 criteria on the Agency's website. MSHA requests comments
16 on this proposed approach to obtaining an input into
17 revisions to the specific Pattern of Violations criteria.

18 MSHA also requested comments on the burden
19 that monitoring a mine's compliance record against the
20 proposed Pattern of Violations specific criteria using
21 the Agency's website would place on mine operators. And,
22 as some of you know, MSHA has developed a web tool to
23 make it easier for mine operators, or quite frankly, mine
24 operators, miners, or any members of the public to
25 monitor a mine operator's compliance.

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1 With this web tool, all a person would have
2 to do is go in, pull up the web tool, on MSHA's website,
3 put in a mine identification number, and, so, that tool
4 would then populate that mine and let one know how close
5 or how far away that mine is from the specific Pattern of
6 Violations criteria.

7 And I'd ask Jay right now, at some point
8 earlier, I know we had gotten a lot of hits on that
9 website. Do you know now about how many?

10 MR. MATTOS: I think about a thousand a
11 month.

12 MODERATOR SILVEY: A thousand a month. So,
13 people are, indeed, using that web tool. And at some of
14 the other public hearings, we were told that people found
15 it useful, and, quite honestly, they have a few other
16 comments to say about it, too. So, you know, obviously,
17 anybody can read the transcripts up to now, or the
18 comments, for that matter, to see what people had to say
19 about the web tool.

20 Under the proposal, to be considered as a
21 mitigating circumstance, the Proposed Rule would provide
22 that an operator may submit a written safety and health
23 management program to the District Manager for approval.
24 MSHA would review the program to determine whether the
25 program's parameters would result in meaningful,

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1 measurable, and significant reductions in S&S violations.

2 And I would also, I guess I turn to Jay, for
3 the mines that have been noticed -- that have been
4 provided PPOV notices, most of them have submitted --
5 under the existing procedures -- we call it Progressive
6 Action Programs, but they have submitted them, all of
7 them have submitted them, and most of them have met their
8 times -- Is that right? And, so, they have, indeed,
9 reduced their S&S violations then and whatever the other
10 parameters were for the specific criteria.

11 MSHA would like to clarify that the Agency
12 did not intend that the safety and health management
13 programs referenced in the Pattern of Violations proposal
14 be the same as that referenced in the Agency's rulemaking
15 on comprehensive safety and health management programs.
16 Some people got the two confused. But the comprehensive
17 safety and health management program rulemaking has not
18 yet gotten to the Proposed Rule stage, and those were two
19 different concepts.

20 MSHA would consider a safety and health
21 management program under the POV rulemaking as a
22 mitigating circumstance when it (1) includes measurable
23 benchmarks for abating specific violations that could
24 lead to a Pattern of Violations at that specific mine;
25 and (2) when it addresses hazardous conditions at that

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1 mine.

2 MSHA requested detailed information and data
3 on cost, benefits, and feasibility of implementing the
4 proposed POV Rule. MSHA requested specific comments on
5 its estimates of the numbers of mines affected, which are
6 likely to vary from year-to-year.

7 As you address the proposed provisions,
8 either in your testimony or in your written comments,
9 again, please be as specific as possible, as we cannot
10 sufficiently evaluate general comments. You may submit
11 comments following this public hearing. They must be
12 received or postmarked by August 1, 2011.

13 MSHA will make available a verbatim
14 transcript of this public hearing approximately two weeks
15 after the completion of the hearing. You may view the
16 transcripts on MSHA's website at www.msha.gov and on
17 www.regulations.gov.

18 We will now begin today's testimony. If you
19 have a copy of your presentation, please provide a copy
20 to the court reporter and to the MSHA panel, if you have
21 a copy. Please begin clearly by stating your name and
22 organization and spelling your name for the court
23 reporter to make sure that we have an accurate record.

24 Our first speaker today is -- and our first
25 speaker, I believe is also Bill Bissett with the Kentucky

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1 Coal Association. And, if he's not here, is Mr. Moss
2 here, David Moss, also with the Kentucky Coal
3 Association?

4 Okay. Having heard neither Bill Bissett nor
5 David Moss, our next speakers will be Charles Scott
6 Howard and Leonard Joseph, representing Cumberland River
7 Coal Company.

8 MR. MATTOS: Scott is not going to testify.

9 MODERATOR SILVEY: Okay.

10 MR. MATTOS: Leonard had some thing come up
11 this morning and couldn't make it.

12 MODERATOR SILVEY: Okay. Then, our next
13 speaker will be Wes Addington, Appalachian Citizens Law
14 Center.

15 MR. ADDINGTON: My name is Wes Addington.
16 I'm an attorney with the Appalachian Citizens Law Center.
17 We're a non-profit law firm that represents working
18 miners on issues of mine safety and health.

19 I had previously submitted written comments
20 on the Proposed Rule on Pattern of Violations, and I
21 would like to add a few additional comments to my earlier
22 remarks.

23 The Law Center really applauds MSHA's work on
24 this Proposed Rule. I do believe that it's long, long,
25 overdue. For decades, MSHA has failed miserably to

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1 implement the '77 Act and the Pattern of Violations
2 provision of Section 104(e) .

3 Actually, the Agency took steps when they
4 promulgated the current rule, which made it much, much,
5 more difficult to place a mine on a Pattern of
6 Violations, and, then, that's why there were, you know,
7 after 33 years, there were no mines ever put on a Pattern
8 of Violations.

9 I mean, essentially this Act was passed the
10 year that I was born. And up until this year, MSHA has
11 never used this authority, and that's a real travesty to
12 miners. It's a great provision of the law. It doesn't
13 seek to punish mine operators. It seeks to go after the
14 worst of the worst, the most chronic violators. And the
15 fact that, you know, it's just now being addressed is
16 disappointing. However, I am very encouraged that it is
17 finally being addressed. And I think MSHA is taking,
18 specifically, taking the right steps to currently correct
19 the problems with the current regulation.

20 Specifically, we support the Section 104.2
21 pattern, criteria -- the proposed rule on Section 104.2
22 Pattern of Violations criteria. I think the combination
23 of the current Sections of 104.2 and 104.3, you know,
24 simplifies the rule and makes it much easier to
25 implement.

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1 I think the most important portion of that is
2 the elimination of the current requirement in 104.3(b)
3 that only citations and orders that have become final are
4 used to identify the mine's Pattern of Violations status.
5 I mean, that current rule is just fully unworkable. It's
6 unreasonable in its current form. It, basically,
7 protects the most chronic violators.

8 You know, because I've noted in my written
9 comments that MSHA had said that on average a contested
10 violation takes 518 days to become final. Well, since
11 then, I've also seen data that says the average
12 unwarrantable failure violation takes currently about 841
13 days from issuance to final order to become final.

14 I'll note that the mine at the Upper Big
15 Branch Mine, I believe had 48 unwarrantable failure
16 orders in 2009. Well, 841 days is a ridiculous amount of
17 time to wait for MSHA to address immediate dangers. I
18 think that the current rule would allow MSHA to evaluate
19 mines in a timely way, so as not to, you know, punish
20 mines for their activities years ago.

21 But, actually, look at what they're doing
22 currently, and, if they're -- you know, if they have 48
23 unwarrantable failures, they can take action immediately
24 to protect those miners, because, obviously, that can be
25 taken as a serious, serious, problem in that mine.

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1 You know -- and as I noted in my written
2 comments, the argument that there's a -- by the industry,
3 that there's a due process issue by not requiring that
4 the citations be final orders. It's really a ridiculous
5 argument. It's not a serious argument. It's just an
6 argument used to avoid implementation of the '77 Act.
7 The data shows that only about 3 percent -- in coal
8 mining, only about 3 percent of citations are vacated or
9 withdrawn, and that's the data from fiscal year 2009 and
10 2010.

11 Well, as I used in an example in my written
12 comments, the Ruby Energy Mine amassed 584 S&S violations
13 within a 24-month screening period. And that criteria at
14 that time was only 20 S&S violations. To think that if
15 the -- if the percentage of withdrawing or vacating
16 citations is only 3 percent, well, 3 percent of 584 would
17 never get them down to 20, not even close. Even if the
18 S&S reduction rate, which I believe I've seen some stats,
19 you know, may be around 15 percent from reducing an S&S
20 violation down to a non-S&S violation. I mean, it's not
21 even in the same ballpark.

22 And, you know, obviously, the -- and I know
23 the -- you noted in your opening remarks that a number of
24 these PPOV listed mines had improved their safety record
25 after being listed on the PPOV list. Well, you know, a

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1 mine that has 584 S&S citations in 2 years, there
2 shouldn't be any additional hand-holding and working with
3 them to try to reduce their amount of serious violations.
4 They should reduce it. I mean, that's just a matter of
5 fact. They're endangering miners currently, and it has
6 to be addressed immediately. It can't be done over, you
7 know, over a process of the period of time for them to
8 change the culture. I mean, that culture needs to be
9 either changed immediately or miners shouldn't be placed
10 in that kind of danger.

11 You know, that same mine incredibly had 78
12 elevated actions, which are you have the 104(b), 104(d),
13 107(a) types of orders and the screening criteria at that
14 time was only two. So, under MSHA's PPOV screening
15 criteria, you know, if a mine had more than two elevated
16 actions within a two-year period, well, then, they would
17 qualify under that particular criteria.

18 To think that those 78 actions need to become
19 final before MSHA is allowed to take action is
20 unconscionable, honestly. That's not what the '77 Act
21 intended. That's not what Congress was working to
22 prevent, another situation like Scotia, where, you know,
23 violation after violation is amass. Even if they're
24 corrected, after a while, the underlying culture of
25 ignoring safety and health until you're caught and forced

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1 to correct those, I mean, that's what Congress is trying
2 to avoid, was an attempt to stop that kind of activity
3 going forward.

4 You know -- and like I said, MSHA really
5 didn't take any action on that until now, and I'm glad
6 they're finally doing it. And dropping the requirement
7 that a citation and order had to become final to be
8 considered for a Pattern of Violation is a major step in
9 the right direction.

10 I mean, other areas of daily life, average
11 citizens don't get that benefit of the doubt. I mean,
12 they don't get -- you know, if I drive 30 miles an hour
13 over the speed limit and get a speeding ticket every day
14 of my life, I don't get 781 days before -- or if it took
15 that long, if our process took that long, I wouldn't get
16 that long to continue to violate the law. What if I got
17 a DUI every month and those didn't come up for trial for
18 781 days, do you think any judge in America would allow
19 me to continue to get those repeatedly without taking
20 some action against my right to drive. It's unbelievable
21 that you would argue that we should, you know, just wait
22 this out and see what happens, when the data says what
23 happens is the vast, vast, majority of these citations
24 are upheld. The industry really doesn't have a
25 legitimate argument that that's somehow a due process

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1 issue against them.

2 We also support the increase in the frequency
3 of MSHA's review of a mine for Pattern of Violations at
4 least twice per year. As I noted in my written comments,
5 I really think that MSHA could devise a system in which
6 much of that review could be done essentially in real
7 time, you know, whether it's weekly or even daily review,
8 in which, you know, a computer program could essentially
9 identify mines that are right on a pattern status with
10 real time data.

11 For example, after an inspection, and then
12 any other additional factors that are taken into
13 consideration as to whether they are placed on a pattern
14 could then be -- that could essentially cause that
15 process to begin. I don't think that's an unreasonable
16 burden upon the Agency to do it that way. I mean -- and
17 that, again, fits within the idea that if we have chronic
18 violators, the miners that are working in those mines are
19 being in danger every day that they're going to work.
20 It's an immediate emergency issue, and I think the review
21 system could be nimble enough, especially when you're
22 talking just about, you know, raw numbers, that if a
23 mine, you know, has a certain number of S&S violations,
24 if they have a certain number of elevated actions, that
25 that kind of data, you know, could be ran in real time.

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1 MSHA could be alerted when a mine exceeds those criteria
2 and if there's any other more subjective criteria, it's
3 taken into consideration. MSHA could do that as the need
4 arises.

5 And, on that same issue, I think the -- I
6 have looked at the web tool that you currently have for
7 the PPOV system. I think that could be improved.
8 Currently, I think you can only search by the MSHA ID
9 number to look at those mines. It would be nice and I
10 don't think it's unreasonable to think that MSHA couldn't
11 devise a search tool in which you could search for mines
12 that have exceeded the specific criteria or multiple
13 criteria. And, essentially, so any individual, any miner
14 working at that mine to look and see how close their
15 operation is to a pattern status or how far away they are
16 from that status. I think it could be improved in that
17 way.

18 You know, I think -- and I think also this
19 twice yearly review, obviously -- and, I mean, it's not
20 going to apply to most operators, so it's not like the
21 Agency would really -- if they could devise a way to
22 review a lot of this data in real time, it's not like
23 this is going to affect the vast majority of operators.
24 So, I don't think it would add a lot of -- it would
25 require a lot of extra resources for MSHA to do this. I

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1 think a lot of it can be automated.

2 As to Section 104.3 the Issuance of Notice,
3 you know, we do support the releasing of any records as
4 to a potential Pattern of Violation. I mean, that's not
5 in the statute; that's not in the Mine Act. That's
6 something that the Agency conjured up, I'm sure, at the
7 insistence of the industry, which has made it much more
8 difficult to ever put a mine on a Pattern of Violations.

9 You know, the complaint I have with language
10 in the Mine Act, you know, really mandates MSHA to notify
11 the operator whenever the Pattern of Violations exists,
12 not, you know, continuously warn them that one may exist
13 in the future, that they're headed down the wrong path,
14 etc. Mine operators are sophisticated business people.
15 They know what's happening in their own mines. They know
16 how many elevated actions they have. They know how many
17 S&S violations they have. They know if their mine is a
18 problem mine, if it's a chronic violator.

19 I think this rule goes a long way to end this
20 sort of handholding, and, really preventing mines from
21 ever being subjected to a Pattern of Violations scrutiny.
22 The whole idea behind that provision is once a mine is
23 placed on a pattern, then the actions that result from
24 that, and the sort of hammer that MSHA has in the Pattern
25 of Violations section, changes the culture of the mine.

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1 If they don't change, then they're not going to operate.
2 They'll get withdrawal order after withdrawal order.
3 And, I think this reference to potential,
4 this idea that these citations should only be final, all
5 it does is just prevent that stricter scrutiny of the
6 most chronic violators. And I really don't understand
7 why, you know, the vast majority of the industry wouldn't
8 be for this rule. If they're not -- because, like I
9 said, it's not going to affect, you know, good operators.
10 It's only going to affect the worst of the worst, and
11 those are the mines where disasters happen. Those are
12 the mines that give the entire industry a bad name.

13 You know, I would note that as the -- as MSHA
14 has sort of stated that they do appreciate the comments,
15 but they also appreciate, you know, the attendees of
16 these public hearings. And I would like to note that
17 although there's been some comments submitted by industry
18 opposing this rule and also opposing the examination
19 rule, we're here in Hazard today and there's not any coal
20 operators in attendance, and there's not anyone from the
21 industry here opposing the rule. There's not anyone
22 sitting in the audience from the industry it appears, so
23 I think some of this opposition is really token
24 oppositions, the general opposition to any rulemaking.
25 So, I think it's a good rule. I think MSHA should

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1 implement it essentially as it's written, other than the
2 few additional changes that I think are needed.

3 And that essentially wraps up my comments. I
4 think this rule would go a long way towards finally
5 addressing the worst of the worst and those chronic
6 violators in the coal industry and go a long ways towards
7 protecting the miners that are currently working in those
8 mines. And that's the most important part of all of
9 this, is the, you know, the miners that have to work in
10 these kind of conditions. MSHA should be protecting them
11 and I think this rule goes a long way towards doing that.
12 Thank you.

13 MODERATOR SILVEY: Thank you. I have a
14 couple comments and maybe a question.

15 On your two major comments, being MSHA's
16 proposal to remember the requirement that beyond the
17 final orders, the use of all the final orders in the
18 Agency's review of a mine for a Pattern of Violations,
19 and on the proposed Pattern of Violations process, the
20 PPOV process, the existing PPOV process we're not re-
21 proposing. You proposed to eliminate that, too. We've
22 got opposing comments, as I'm sure all of you know, on
23 those two, and you referenced that in your testimony.

24 We've got opposing comments on those two
25 provisions. And to rephrase maybe what you said, you

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1 thought that the existing final order provision was
2 unworkable, unreasonable, and it protects chronic
3 violators. And we heard from them that it -- and you
4 made a reference to the Mine Act and to Scotia, which we
5 did in the Proposed Rule in the printout; and we've got
6 opposing comments that said it deprives -- that the
7 persons and organizations who oppose that portion, that
8 part of the proposal said that deprives them of their
9 Constitutional rights and that they said -- I think in
10 response to our reference to the '77 Mine Act, they said
11 that the Mine Act doesn't trump the Constitution.

12 I would only ask you, and not to put you on
13 the spot, but if you wanted to answer now or to, you
14 know, submit supplemental comments before August 1st, I
15 will ask you when you said that the arguments who
16 opposed, those who opposed this are not serious
17 arguments. I would ask you if you have any additional
18 specific, for lack of a better word, arguments to make in
19 support of your position. Which is, I might add for
20 everybody here, which is MSHA's position, too.

21 MR. ADDINGTON: Yeah. The reason I say it's
22 not serious is if operators that were contesting, you
23 know -- you know, a lot of these operators are
24 contesting virtually every citation that they're getting.
25 If they were serious that they believe this was a true

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1 due process issue, which is that ultimately they could be
2 shown to be correct and that placing them on a Pattern of
3 Violations was unwarranted, because all the citations and
4 violations that MSHA noted somehow turned out to be
5 incorrect and they should never been on the Pattern of
6 Violations at all, if they were serious in that argument,
7 we wouldn't have the kind of data that we're seeing. I
8 mean, you can't make that argument with the kind of data
9 that currently exists on these contested citations.

10 If the Commission were overturning, you know,
11 50 percent of citations, you know, if they were being
12 withdrawn or vacated, if, you know, a high percentage of
13 S&S citations were being downgraded to non-S&S, you might
14 have a due process issue there. When it's 3 percent of
15 withdrawn or vacated, that's not even statistically --
16 it's negligible.

17 You know, you have to have a situation where
18 an operator was essentially one violation over the
19 criteria, and 3 percent -- you know, essentially, they
20 have to be one violation over the criteria, and then
21 there'd be a theory of, you know a 3 in 100 shot of
22 having that over -- it's just not -- it's not going to
23 happen. I say this Ruby Energy, they had 584. The
24 criteria was 20. You know, they would have had to have
25 500-and-what-65 of those either downgraded or overturned

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1 to fit below the criteria.

2 I mean, it's just not -- and the thing is, if
3 they're really concerned about the -- and it would be an
4 outlying case in which with the statistics that we have
5 now, it would be an outlying instance where a mine would
6 qualify for a Pattern of Violations and one citation or
7 two citations are ultimately overturned and that would
8 bring them back under the criteria. That would be a
9 complete outlier. I mean, I'm not a statistician, but I
10 think there can be an analysis that says essentially the
11 odds of that happening are very, very, small.

12 MSHA can deal with that under their criteria
13 proposals. I mean, that's what I was talking about, the
14 subjective part of that, and they can take that kind of
15 instance into consideration. And I don't think, frankly,
16 I don't think courts would look at that as a due process
17 issue. There's lots -- I mean, I think currently MSHA
18 takes actions. There's plenty of ways under the Mine Act
19 that MSHA can take a current action without waiting for
20 the underlying issue to make its way through the court
21 system before they take an action. I don't think
22 operators, especially as the law is written, are entitled
23 to some, you know, date in court on every single citation
24 that they get when it comes to assessing whether they
25 qualify for a Pattern of Violations. That's not the

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1 intent of the pattern status, you know, immediate
2 situations, you know. And that's part of the -- it's
3 part of the reason that they're contesting all of these
4 is they know that it avoids the stats.

5 MR. MATTOS: Wes, one of the comments we're
6 receiving from a lot of folks involves they're suggesting
7 that we should have a specific Pattern of Violations for
8 any criteria in the rule itself, rather than publishing
9 what the criteria are; and then we've added a provision
10 in their behalf of notice of comments type procedure in
11 place, but you didn't speak to that.

12 Do you have any thoughts on that?

13 MR. ADDINGTON: Yeah. I didn't address that.

14 I think MSHA adequately could do it either
15 way and I haven't really taken a strong position on that.
16 I think the way it's currently written will work just
17 fine. I think it gives the Agency the flexibility to
18 adjust the criteria to -- this is really in 33 years the
19 first time MSHA is going through this. I think the
20 current way the Proposed Rule is written would allow MSHA
21 the flexibility to make sure that they're doing what the
22 Act intended and that is to sort of snag the most chronic
23 violators, the violators that get citation after citation
24 and violation after violation, and, you know, just
25 abating them, you know, when they're essentially required

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1 to, but just keep the same, and they're really not
2 improving conditions in their mine.

3 I think the current framework, the way the
4 current rule is written, I think it allows MSHA the
5 flexibility to make sure they're snagging those people
6 and snagging, you know, essentially snagging the right
7 ones, and if they're not snagging the worst of the worst,
8 they can then amend that, I think, you know, through
9 internal criteria.

10 I think if they're, you know, the industry is
11 worried that they're snagging too many, you can also
12 adjust to that. I think, you know, there's just a lot of
13 problems with publishing that as part of a rule, because
14 then, as we've seen with the current rule, it can make
15 the whole system unworkable and never used. I think that
16 you have to hear on the -- I mean it's a remedial
17 statute. You have to err on the side of miners on this
18 issue. You have to err on the side of their health and
19 safety and protection, not -- and not have a situation
20 like we currently have where a mine -- the Agency cannot
21 jump through all the hoops that are required to ever
22 place, even the worst violator on a pattern. So,
23 frankly, I think the current rules as written works just
24 fine.

25 MR. MATTOS: Thank you.

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1 MODERATOR SILVEY: Okay, thank you.

2 Our next speaker is Tony Oppegard with
3 Appalachian Citizens Law Center.

4 MR. OPPEGARD: I want to thank the panel for
5 giving me the opportunity to speak. And, Pat, I'm not
6 with Appalachian Citizens Law Center.

7 MODERATOR SILVEY: I stand corrected.

8 MR. OPPEGARD: I'm just an attorney in
9 private practice representing miners and their families
10 in safety-related issues.

11 Now, back in April, I did submit comments
12 with Wes in conjunction with Appalachian Citizens Law
13 Center, and we stand by those comments.

14 To give some context to my comments, I just
15 want to comment briefly on my experience. I've been
16 involved with safety issues under the Mine Act for more
17 than 30 years and I've represented coal miners in 105(c)
18 cases for about 25 years. I worked for MSHA for about
19 2-1/2 years at headquarters, and I was the prosecutor of
20 mine safety violators for the State of Kentucky for about
21 4-1/2 years in the early 2000s, and, as part of that,
22 I've investigated accidents, investigated disasters.

23 The last five years I've been representing
24 families of miners in wrongful death cases. So, that's
25 the context in which I'm going to make these forthcoming

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1 statements, and I'm going to probably go -- not probably,
2 I'm definitely going to make some comments that are
3 outside the scope of the rule, but I hope you'll bear
4 with me, because, again, I think this needs to be made in
5 some context.

6 Where I want to start with is I've read the
7 transcripts of the prior public hearings having to do
8 with the Pattern of Violations Rule and I've read a lot
9 of the comments, not all of them, but a lot of them, that
10 industry has submitted. Because we're in Kentucky and my
11 focus is representing miners primarily in Eastern
12 Kentucky in non-union mines, I want to read in something
13 from the comments of the Kentucky Coal Association, Bill
14 Bissett, President. This is how he answers comments.

15 "MSHA's new Proposed Rule on POV moves
16 everyone in the wrong direction. It creates a further
17 exacerbating opinion that the Administration in
18 Washington, D.C. is trying to slowly bankrupt the
19 Appalachian coal industry by adding additional
20 regulations."

21 Now, seriously, that's the coal industry's
22 position that the POV Rule is an attempt to bankrupt the
23 coal industry. It's an irresponsible comment. It's
24 inflammatory. It's nonsense. And I think that needs to
25 be pointed out. And because of these types of comments,

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1 I want to comment on what I view the direction in which
2 the Obama Administration, under the leadership of Joe
3 Main, is taking things with regard to mine safety, and
4 I'll make these brief before I get on to the POV Rule
5 specifically.

6 I've got four instances in which I want to
7 give credit to Joe Main, credit to MSHA and the Obama
8 Administration for the way that MSHA is being run these
9 days. First of all, has to do with miners' rights.
10 There is an emphasis on miners' rights now that has not
11 been seen in decades in D.C., and, specifically, with
12 regard to temporary reinstatement for coal miners who've
13 been fired from their jobs for complaining about safety
14 or refusing to work in unsafe conditions.

15 Now, Scott Howard, who testified in the
16 previous Work Place Examinations Hearing earlier this
17 morning, it's four years ago today that he testified in
18 front of an MSHA panel, including Pat Silvey, on the
19 Proposed Mine Seal Regulation. It was an emergency
20 temporary standard, because of the Kentucky Darby
21 disaster and the Sago disaster, which involved faulty
22 construction of seals.

23 At that hearing, Scott had the audacity to
24 show a video of seals in the mine where he worked,
25 without identifying that mine, there were spewing water

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1 leaking, an obvious safety hazard. And we stated on the
2 record at that time that that was a protected activity
3 and we expected Scott to be protected by MSHA if he
4 suffered any type of discrimination or discipline.

5 Not surprisingly, about two weeks later, he
6 was disciplined by his employer for showing that video at
7 the MSHA Public Hearing. And, to MSHA's shame, MSHA did
8 not accept that case for prosecution. But that was a
9 different administration. That was the Bush
10 Administration, where miners' rights was a dirty word, or
11 a dirty phrase. And that was a case that MSHA should
12 have taken.

13 Wes Addington and I took the case,
14 represented Scott, and we won that case in front of an
15 Administrative Law Judge. The case was not appealed. It
16 was a no-brainer, a decision for the ALJ. He had no
17 problem in finding that Scott was discriminated against
18 for having testified at this MSHA Public Hearing.

19 The point I want to make is what that has
20 caused Scott is four years of litigation and four years
21 of problems. It was four years ago today he testified.
22 We've been in litigation the last four years with this
23 same company. Five discrimination cases, and he was
24 fired May 16th of this year. That's the fifth case.

25 And times have changed. MSHA, within 11 days

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1 after Scott filed that discrimination complaint, MSHA had
2 filed an Application for Temporary Reinstatement. It's
3 probably the fast, not probably, it is the fastest that
4 MSHA ever, in its history, has filed an Application for
5 Temporary Reinstatement on behalf of a miner. So, we now
6 have Scott back on the payroll. And that's the way it's
7 supposed to be done and that is the emphasis on miners'
8 rights, which Joe Main is placing. It's not an attempt
9 to bankrupt the coal industry in Eastern Kentucky.

10 Now, the second place where I want to praise
11 Joe Main and MSHA is for the respirable dust rule, long,
12 long, overdue. Someone is finally doing something about
13 it, or trying to do something about it.

14 The third is on the use of Section 108(a)(2)
15 under the Mine Act. This is the most, the two most
16 effective, or the most powerful enforcement tools that
17 MSHA has in its toolbox, is Section 108(a)(2) where they
18 can go into federal court and seek an injunction against
19 an operator who has a Pattern of Violations that
20 jeopardizes miners' health and safety. Never been used.
21 Never. 1977 it's been in the law. Thirty-three years,
22 never been used until Joe Main came into office, and now
23 it's been used against Freedom Energy in Pike County,
24 Kentucky, and used successfully.

25 In part, it was never used because of the

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1 Solicitor's Office in D.C. being afraid of its own
2 shadow, being afraid to take on the coal industry, and
3 being afraid that if we go in front of a federal judge,
4 we're going to lose because we haven't put this mine on a
5 Pattern of Violations, therefore, we can't use Section
6 108(a)(2).

7 I never looked at it that way, never thought
8 that was the right way to look at it. And, indeed, when
9 MSHA finally had the guts to use it and go in front of a
10 federal judge, and that issue was presented, MSHA won.
11 Judge Supar said, "No, you don't have to be on a Pattern
12 of Violations to seek an injunction under 108(a)(2)."

13 And, then, finally we have the POV Rule.
14 This is a fourth example. It's never been used, as Wes
15 said, in 33 years. I don't think we should lose sight of
16 the fact that there's a human context to all of this.
17 Scotia is right up the road; it's the next county,
18 neighboring on Perry County here, Letcher County.
19 Twenty-six miners and mine inspectors killed in twin
20 explosions, March 1976. That's why there is a POV Rule.
21 Because Congress looked at what happened at Scotia and
22 said, "This is outrageous." You have a mine with
23 repeated violations over and over again. They get cited;
24 they have to abate it. Next time MSHA does that, the
25 same thing, cited, abated.

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1 But nothing ever changes. We need a stronger
2 enforcement tool. So they put the POV in the Section
3 104(e) of the law, and they also put in the injunction
4 Section 108(a)(2). But 33 years later, neither one of
5 them has ever been used. MSHA's two most powerful
6 enforcement tools are laying idle in their toolbox. It's
7 unacceptable. And Joe Main has changed that. So instead
8 of being praised for that, for finally doing what the law
9 says to do, you have the Kentucky Coal Association
10 saying, "They're trying to bankrupt us."

11 The Senate Committee who passed the Mine Act
12 and commented on it in the legislative history never
13 could have anticipated -- they would have been amazed if
14 they were all around today. "It's 2011 and no one has
15 ever used this law that we gave you. It's sat idle all
16 these years." I think they would not only be dismayed,
17 they'd be disgusted.

18 Now, turning to the POV itself, I just want
19 to read the critical portion of the law. "Section
20 104(e)(1): If an operator has a Pattern of Violations of
21 mandatory health or safety standards in the coal or other
22 mine, which are of such nature as could have
23 significantly and substantially contributed to the cause
24 and effect of coal or other mine health or safety
25 hazards, he shall be given written notice that such

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1 pattern exists."

2 Legally, the term shall is mandatory, it's
3 not discretionary. Courts over and over again have held
4 that shall, "He shall be given written notice that such
5 pattern exists." As Wes said, the plain language of the
6 statute supports the POV Rule with regard to not giving a
7 notice or written warning.

8 I think it's important to point out what that
9 statute doesn't say. It doesn't say, "Send the coal
10 operator a warning letter and say you've been a bad boy
11 and if you don't become a better boy, then maybe we're
12 going to take some action two years down the road." It
13 doesn't talk about a written warning.

14 Now, MSHA has the authority in the regulatory
15 process to "fill in gaps" in the statute, but MSHA does
16 not have the authority to do something in direct
17 contravention of what a statute says they have to do. In
18 other words, they can't disobey the statute. They can't
19 -- if the statute says you have to inspect all
20 underground coal mines four times a year, MSHA can't
21 issue a reg saying, "We're going to inspect them two
22 times a year." That violates a statute.

23 In my view, the regulation that says we have
24 to send out a written warning to coal operators when we
25 think they may have a Pattern of Violations, violates the

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1 statute. A lawsuit should have been filed when that
2 regulation was implemented; and my belief is if a lawsuit
3 had been filed, that regulation never would have
4 withstood scrutiny; that the plain language of the Act, a
5 court would have said it violates the plain language of
6 the Act, and would have struck down that regulation.

7 Now, what's the result? Since the early '90s
8 we've had this written warning. The result is that no
9 one has ever been placed on a pattern. And I think it
10 was an intentional cynical attempt by the Bush
11 Administration, the first Bush Administration, to help
12 coal operators, to ensure that no coal operator was ever
13 put on a Pattern of Violations. That's exactly what it
14 accomplished. That regulation was a gift to coal
15 operators, an undeserved gift to outlaws, knowing that if
16 we put this in, none of them are ever going to be put on
17 a Pattern of Violations.

18 Now, finally, we have someone doing the right
19 thing, saying this written warning never should have been
20 promulgated and wanting to delete it, and you have the
21 coal industry whining about it.

22 Now, they want "transparency." Every
23 operator who submitted comments, they all use the same
24 buzzer, "We need transparency." Why? As Wes said, no
25 good coal operator has anything to fear about the POV

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1 Rule. It's the outlaws who are going to be affected by
2 it. And this is a rule that should have been used dozens
3 and dozens of times since 1977. Upper Big Branch should
4 have been placed on a Pattern of Violations, and Sago
5 should have been placed on a Pattern of Violations.
6 Aracoma should have been placed on a Pattern of
7 Violations.

8 I represent four of the widows and the sole
9 survivor of the Kentucky Darby Disaster. They should
10 have been placed on a Pattern of Violations. They had
11 something like 30 accumulations violations, and you all
12 know what I'm talking about. Accumulations is just a
13 failure to clean up your mine, to clean along your belt
14 lines. It means you're too sorry and you care so little
15 for the health and safety of your employees that you
16 can't get a guy with a shovel to shovel along the belt
17 line. That's where an accumulations violation is. They
18 had about 30 of them. They should have been on a Pattern
19 of Violations.

20 Had Upper Big branch been placed on a
21 pattern, or had MSHA gone to court under Section
22 108(a)(2), maybe we'd have all these 29 miners who were
23 killed, maybe they'd still be alive. And the same with
24 Kentucky Darby.

25 And I've seen families how disasters tear

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1 apart families and damage families forever. It's not
2 something that goes away in a year or two. It destroys
3 families. And isn't that what the Pattern of Violations
4 Rule is all about, is to prevent disasters. But, yet,
5 you have these irresponsible comments from the Kentucky
6 Coal Association that what you're really trying to do is
7 bankrupt the coal industry. No, I think the rule is
8 trying to prevent disasters and trying to prevent having
9 widows and orphans.

10 The other point about the POV is what I think
11 Wes addressed very articulately about final orders and I
12 don't need to go into that in any great detail. But the
13 due process argument, I think it's a red herring.

14 And, Jay, you asked a question of Wes. I
15 would just refer you to Representative Miller's comments,
16 and I think it covered very thoroughly why the due
17 process argument that's been raised by industry doesn't
18 have a leg to stand on. It's a very good synopsis of why
19 that's a faulty argument.

20 And, again, I want to re-emphasize what
21 Representative Miller put in his comments about the 841
22 days that it takes for the issuance of an unwarrantable
23 failure citation to become a final order. And, again,
24 that's about 2-1/2 years. And, it's not realistic to
25 think that you can't count unwarrantable failures that

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1 take 2-1/2 years to litigate. You can't take them into
2 consideration when placing a company on a Pattern of
3 Violations.

4 Again, to re-emphasize what Wes said that the
5 Pattern of Violations is for the worst of the worst; it's
6 the outlaw operators who have that to fear. And I read
7 the comments by some former MSHA inspector, I don't
8 remember his name, but who now works for industry, who
9 was bemoaning the fact that, you know, a Pattern of
10 Violations is a "death penalty" for operators. He said,
11 "We used to sit around the MSHA office and talk about how
12 if we put someone on a pattern that," you know, "It was a
13 death penalty that would ruin their business, basically."

14 Well, first of all, you can get off the
15 pattern. Once you're on, you can get off. It may be
16 hard to get off, but it's not impossible like all these
17 industry commenters are saying, that it's impossible to
18 go 90 days without an S&S violation. No, it isn't
19 impossible. Because if you look at the data, plenty of
20 operators go 90 days without an S&S violation, if you
21 have a commitment to safety.

22 If you know you're on a pattern, why should
23 you get any S&S violations in the next 90 days? Do
24 things right. The operators that have to worry about
25 this law are those who don't care about health and safety

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1 of their miners, who are willing to play Russian roulette
2 with their miners' health and safety. And those
3 operators do exist.

4 I had a coal miner call me a couple weeks ago
5 and tell me that in the mine where he's working, the ATRS
6 doesn't reach the top. So what do they have the guy
7 doing? He's standing on the pod; they raise it; he's 2
8 or 3 feet from the roof, trying to put in a bolt, where
9 all he has to protect himself is his hard hat. There's
10 no shield over him; there's no ATRS; and they've been
11 doing that for three shifts. Those are the kind of
12 operators who don't care about miners. All they care
13 about is getting the coal out of the ground, and those
14 operators very easily could have been killed, and they're
15 playing Russian roulette with their lives. "Just do it
16 for a few more days until we get in lower coal and then
17 you'll be okay," instead of doing things the right way.

18 Those are the type of operators that have to
19 worry about being placed on a pattern, not your good
20 operator. No operator with any decency would put a miner
21 in that situation, knowing that that person is risking
22 their life; that if the roof falls, he's probably going
23 to be killed or seriously injured.

24 I want to read one other comment from the
25 Kentucky Coal Association, and Mr. Bissett said, "Under

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1 this new Proposed Rule," that's the POV Rule, "MSHA
2 inspectors would be given the power to shut down entire
3 or parts of an operation at his/her own discretion. An
4 inspector could concoct enough citations or orders to
5 meet the criteria and establish a Pattern of Violations."

6 Again, irresponsible, reckless, nonsensical,
7 delusional comment. He honestly thinks an MSHA inspector
8 is going to concoct violations with the specific purpose
9 of placing that mine on a pattern. That's absurd. Do
10 inspectors make mistakes? Yes. Do we have inspectors
11 who are concocting violations because they don't like an
12 operator? I think it's hard to believe. Has it ever
13 happened? Who knows. But enough that you could put a
14 mine on a Pattern of Violations? It's ridiculous.
15 That's these types of irresponsible comments from the
16 coal industry.

17 Kentucky Coal Industry, by the way, has never
18 seen a safety regulation that it liked, ever. Every
19 single safety regulation that MSHA or the State of
20 Kentucky has ever proposed in the last 40 years, the
21 Kentucky Coal Association has opposed. It doesn't matter
22 how basic it is. We ought to landmark Mine Safety Law
23 passed in Kentucky in 2007. The industry opposed every
24 provision in it, including a seal provision. They didn't
25 even want a company to have to certify that a seal was

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1 properly built. That was too radical of an idea for
2 them.

3 So, you take two examples in Mr. Bissett's
4 comments: (1) that MSHA inspectors are going to concoct
5 violations that don't really exist; and number (2)
6 they're doing it to bankrupt the coal industry. It's
7 part of the industry's mindset that they teach their
8 employees -- and Scott can tell you this -- that "the
9 inspector is your enemy, MSHA is your enemy. MSHA is not
10 here to protect your health and safety. MSHA is here to
11 shut your mine down and take your job so that your kids
12 will starve." That's what miners hear. That's what
13 they're taught, "When an inspector comes on the job, he's
14 your enemy." And these are the kinds of people that
15 we're getting comments from.

16 I also read the comments, a very long thing
17 from Mr. Bumbico from Arch, the same company that's
18 discriminated against Scott for the last four years and
19 fired him, who says they have -- they're safety
20 conscious, but it's only on paper.

21 And I know in the first comments, Scott's
22 comment about potato salad -- I know it went over your
23 head, Pat, you probably don't know what he was talking
24 about -- but at the seal hearing in 2007, July of 2007,
25 after the Kentucky Darby widows had to summon up the

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1 courage to talk about why they thought this rule was a
2 good rule, the then President of the Kentucky Coal
3 Association, Bill Caylor, got up and started complaining
4 about how every time there's a coal miner who gets
5 killed, it's on the front page of the news, but what
6 about the thousand people in the United States who die of
7 bad potato salad every year, that's what Scott was
8 talking about. It's that lack of sensitivity that the
9 Coal Association brings to their comments.

10 So, in summary, Joe Main and MSHA are doing
11 what they're supposed to do by this rule. This rule
12 should have been in place a long time ago, and kudos to
13 the Agency for finally doing the right thing.

14 You asked Wes, Jay, about whether the
15 criteria should be in the rule or whether, you know, it
16 can be policy. I probably look at it a little
17 differently. I think the criteria should be in the rule.
18 And the reason I think it should is specifically because
19 the next Republican Administration that gets in, if it's
20 not in the rule, they're going to change it to where a
21 POV is a worthless regulation again. It's exactly what's
22 going to happen. So, I think it should be in the rule so
23 that, you know, you're either going to have to rescind
24 that rule; they're going to have to go to Congress for
25 relief, rather than just doing something through policy.

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1 And, again, I think the two major points I
2 want to make is, Number 1, we shouldn't have the written
3 warning. There's no place in the rule for it. It
4 violates the -- it violates the statute. Number 2, the
5 due process arguments that industry are making are red
6 herrings, that this regulation will withstand judicial
7 scrutiny on a due process argument.

8 And, again, I think the whole purpose of the
9 rule is to prevent disasters, and not just disasters, but
10 miners from dying, one at a time, which is how most
11 miners die in this country, is one at a time. A few
12 people know about it, and a few people read about it.

13 But I think this rule will prevent, help
14 prevent, those deaths, and that's what the Mine Act is
15 supposed to be all about. The Mine Act doesn't talk
16 about coal production. The Coal Association talks about
17 coal production, but the Mine Act doesn't. It's an Act
18 to protect the health and safety of miners. It doesn't
19 have as a goal that we produce X amount of tons of coal
20 per year.

21 So, I fully support this regulation and I
22 hope that MSHA will stick by it. And if industry wants
23 to challenge it in court, then I think the government
24 attorneys are up to that challenge.

25 Thank you.

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1 MODERATOR SILVEY: Thank you. I'd just like
2 to make one comment.

3 As you noted, Tony, at the beginning of your
4 comments that your statement with respect to the miners'
5 rights, the respirable dust rule and Section 108(a)(2)
6 are beyond the scope of this ruling, so I'd just like to
7 note that for the record.

8 Thank you.

9 Our next person is Sam Petsowk with the
10 Appalachian Citizens Law Center.

11 Does anybody else wish to make -- provide
12 testimony? Does anybody else wish to provide any
13 testimony?

14 If nobody else wishes to make a presentation,
15 then I would like to say on behalf of the Mine Safety and
16 Health Administration that we appreciate your
17 participation at this Public Hearing. I want to thank
18 everyone who has made presentations. And, as you've
19 heard me say a lot of times, for those of you who did not
20 present, but who attended the hearing, I want to say that
21 we appreciate that, because that says to us that you have
22 an interest in this rulemaking, and we appreciate your
23 interest.

24 I want to emphasize that all comments must be
25 received by MSHA by August 1, 2011. MSHA will take your

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1 comments and your concerns into consideration as we draft
2 the final rule.

3 I want to encourage all of you to participate
4 throughout the rest of this rulemaking and in all MSHA
5 rulemakings.

6 This Public Hearing is concluded. Thank you
7 very much.

8 (Off the record.)

9 (On the record.)

10 MODERATOR SILVEY: Again, my name is Patricia
11 W. Silvey. And with me is Jay Mattos, who is Chair of
12 the Rulemaking Committee on MSHA's Proposed Rule on
13 Pattern of Violations.

14 I'd like to reopen the rulemaking record for
15 the public hearings on the Agency's Proposed Rule on
16 Pattern of Violations. And, at this point, we have Bill
17 Bissett with the Kentucky Coal Association.

18 MR. BISSETT: Thank you. It's an honor to be
19 here today and to share these comments on behalf of the
20 Kentucky Coal Association.

21 The KCA would like to submit these comments
22 to the Mine Safety Health Administration regarding its
23 Proposed Rule for the Pattern of Violations, POV, under
24 30 C.F.R. Part 104.

25 In the current system established by

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1 Congress, the POV process can only be established after a
2 citation order has been adjudicated and a potential
3 Pattern of Violations is affirmed.

4 The current process will be changed to allow
5 for a mine operator to be found guilty of a specific MSHA
6 violation before he or she has a chance for due process.
7 This lack of appeal would give MSHA absolute power that
8 creates a horrific legal quandary.

9 Under this new Proposed Rule, MSHA inspectors
10 will be given the power to shut down an entire, or parts
11 of, an operation at his or her discretion. An inspector
12 can concoct enough citations or orders to meet the
13 criteria and establish a "Pattern of Violations."

14 After an operation uses its appeals process,
15 and an administrative law judge vacates a previous
16 citation or order, the company is still being punished as
17 having a previous status of POV. In essence, the company
18 is treated as a guilty defendant before a final judgment
19 is issued.

20 Another damaging aspect of this Proposed Rule
21 is deleting the requirement for an operation to receive
22 written notice of MSHA's consideration that it might be
23 placed on POV status. Currently, if an operation does
24 receive a letter stating MSHA has perceived a
25 determination that it is under consideration to be placed

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1 on POV status, that operation then can evaluate and
2 correct those designated citations. No prior
3 notification would further eliminate an element of
4 transparency by MSHA. Let me repeat that sentence, "No
5 prior notification would further eliminate an element of
6 transparency by MSHA."

7 Unchecked federal authority will create a
8 heightened level of uncertainty throughout the mining
9 community. Under the Proposed Rule, an operation that is
10 placed on POV status will find no mechanism in place that
11 allows them to dispute MSHA's findings. Furthermore, a
12 90-day window is created in which any inspector that
13 might find any Significant and Substantial S&S violation
14 within that time frame can, or will, issue an Order of
15 Withdrawal for all individuals in a designated area and
16 order cessation of operations at that time.

17 In the current regulatory mindset of MSHA
18 inspectors, it is regarded that all mine inspectors view
19 most violations as S&S, regardless of the situation.
20 Hence, the likelihood that any operation could go 90 days
21 without an S&S violation is highly unlikely.

22 The Kentucky coal industry always sees a need
23 for improvement, but that commitment also needs a high
24 degree of transparency from the regulatory agencies that
25 monitor all activities. The Fifth Amendment under the

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1 United States Constitution defines a level of checks and
2 balances and this Proposed Rule is viewed as an
3 encroachment on those individual and property rights.

4 This level of security afforded by the
5 Constitution is sometimes regarded as an alienable right.
6 The due process afforded to every individual would be
7 greatly diminished under this Proposed Rule. The current
8 POV Rule allows for mediation during the process, and to
9 do away with that would empower the Executive Branch with
10 unchecked power. This is unacceptable.

11 In conclusion, the mining community does
12 believe that more power should be allotted to the
13 Department of Labor. The laws and regulations set forth
14 by the United States Congress are sufficient to maintain
15 and regulate all coal mining in the United States.

16 Coal mining had an unfortunate tragedy in
17 2010, but industry experts state that MSHA already
18 possesses the power to shut down a mine if an imminent
19 danger is deemed present. And the current backlog of
20 cases currently being adjudicated is a greater hindrance
21 versus MSHA needing additional executive powers.

22 In Kentucky, we currently have more than
23 18,000 miners employed in our industry; and for every 1
24 job, 3 others are created indirectly. The coal industry
25 in Appalachia has been drastically hampered by the

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1 federal regulatory uncertainty created during the last
2 three years by the Environmental Protection Agency.

3 Coal mining permits have been trickling
4 through, but most are still caught in a regulatory black
5 hole, which stifles production. Ultimately, our goal is
6 a continued level of cooperation between the industry
7 employees and those regulators at the state and federal
8 level.

9 MSHA's new Proposed Rule on POV moves
10 everyone in the wrong direction. It creates a further
11 exacerbating opinion that the Administration in
12 Washington, D.C. is trying to slowly bankrupt the
13 Appalachian coal industry by adding additional
14 regulations. KCA believes this new rule is a major step
15 in the wrong direction.

16 Thank you.

17 MODERATOR SILVEY: I have a few -- thank you.
18 I have a few comments.

19 First of all, let me say that your comments
20 relative to the Environmental Protection Agency -- and
21 I'm sure you would agree with that, too -- are beyond the
22 scope of this rulemaking, so I just want the record to
23 show that those comments are beyond the scope of this,
24 MSHA's Proposed Rule on Pattern of Violations.

25 Second of all, you mentioned the transparency

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1 by MSHA. And with respect to transparency, MSHA intended
2 to advance the concept of transparency in this Proposed
3 Rule and in that I want to make two points. One being
4 that with respect to the specific criteria that the
5 Agency would use to review a mine for a pattern, that
6 specific criteria, and in the Public Hearing Notice we
7 refined the process some, if you recall the Public
8 Hearing Notice.

9 That specific criteria would be posted on the
10 Agency's website. And we said that before we made any
11 change to that criteria, we would put it on the Agency's
12 website; take comments from the mining public; review the
13 comments; respond to the comments; then, revise the
14 criteria as appropriate; and post any revised criteria on
15 the website.

16 Now, one of the reasons I said that was this
17 specific criteria is what MSHA uses, what MSHA used to
18 come up with this web tool that the Agency has posted on
19 its website right now, that mine operators can go into
20 this web tool and can determine if, according to that
21 specific criteria, they may be approaching the boundaries
22 of a Pattern of Violations, and they could come into MSHA
23 under a provision in the -- under the existing
24 procedures, as well as in the Proposed Rule, as a
25 mitigating circumstance. They could come into -- with a

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1 corrective action program. That's what we called it in
2 the existing procedures and under the Proposed Rule is a
3 safety and health management program to improve the
4 conditions that gave rise to the pattern.

5 What are your thoughts on that procedure?

6 MR. BISSETT: Ma'am, I just stated my
7 testimony that I've read today, because I think that best
8 represents the interests of my member companies.

9 MODERATOR SILVEY: Well, have you looked at
10 the web tool? Have you, any of your operators, do you
11 know -- let me ask you, have you used the web tool?

12 MR. BISSETT: Ma'am, I'm going to refer to my
13 testimony that I read today and stay with that.

14 MODERATOR SILVEY: Well, let me ask you this,
15 then, all right. Just like I asked you for the purpose
16 of your testimony being as useful to us as it could be --
17 okay -- and in terms of you to try conforming your
18 testimony to making it the most useful to us, if you
19 could, if you wanted to ask some of your member companies
20 have they used the web tool, and what do they think of
21 the provision of what we put in the Public Hearing Notice
22 about if we make -- I'm sorry; let me rephrase that.

23 Have they used the web tool, and what do they
24 think about using it to determine whether they may be
25 approaching a Pattern of Violations, and, therefore,

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1 whether they might come into MSHA for a mitigating
2 circumstance. If you would just ask them that.

3 MR. BISSETT: I'd be happy to carry that.

4 MODERATOR SILVEY: And if you have any answer
5 to that, if you would provide it to us before the record
6 closes. Okay, thank you very much.

7 Okay. If there are -- if nobody else wishes
8 to make a presentation, I want to say again that the Mine
9 Safety and Health Administration appreciates your
10 participation at this public hearing.

11 I want to emphasize that all comments must be
12 received by August 1st, 2011. MSHA will take your
13 comments and your concerns into consideration in
14 developing a final rule.

15 This public hearing is now concluded. Thank
16 you very much.

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REPORTER'S CERTIFICATE

CASE TITLE: Patterns of Violations

HEARING DATE: July 12, 2011

LOCATION: Hazard, Kentucky

I hereby certify that the proceedings and evidence are contained fully and accurately on the audio and notes reported by me at the hearing in the above case before the Department of Labor, Mine Safety & Health Administration.

Date: July 12, 2011

ANTHONY & ASSOCIATES, INC.


EVELYN KELLY
(Official Reporter)

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PRESENTERS

Pattern of Violations

July 12, 2011

Hazard, Kentucky

Name	Organization
1. Bill Bissett President	Kentucky Coal Association
2. David Moss Vice President	Kentucky Coal Association
3. Charles Scott Howard & Leonard Joseph Coal Miners	Cumberland River Coal Company
4. Wes Addington Attorney-at-Law	Appalachian Citizens Law Center
5. Tony Oppegard Attorney-at-Law	Appalachian Citizens Law Center
6. Sam Petsonk Law Student/Clerk	Appalachian Citizens Law Center

AB73-PH-5A

SIGN-IN SHEET

Pattern of Violations

Hearing
Hazard, Kentucky

July 12, 2011

	Name	Organization	Contact Info.
1.	<u>Charles Scott Dowsey</u>	<u>MWNR</u>	<u>606 633 3878</u>
2.	<u>Tony OPPLEGARD</u>	<u>ATTY-AT-LAW</u>	<u>859-948-9234</u>
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4.	<u>Jimmy Newman</u>	<u>UMWA</u>	<u>606-832-4768</u>
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